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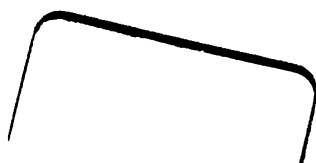
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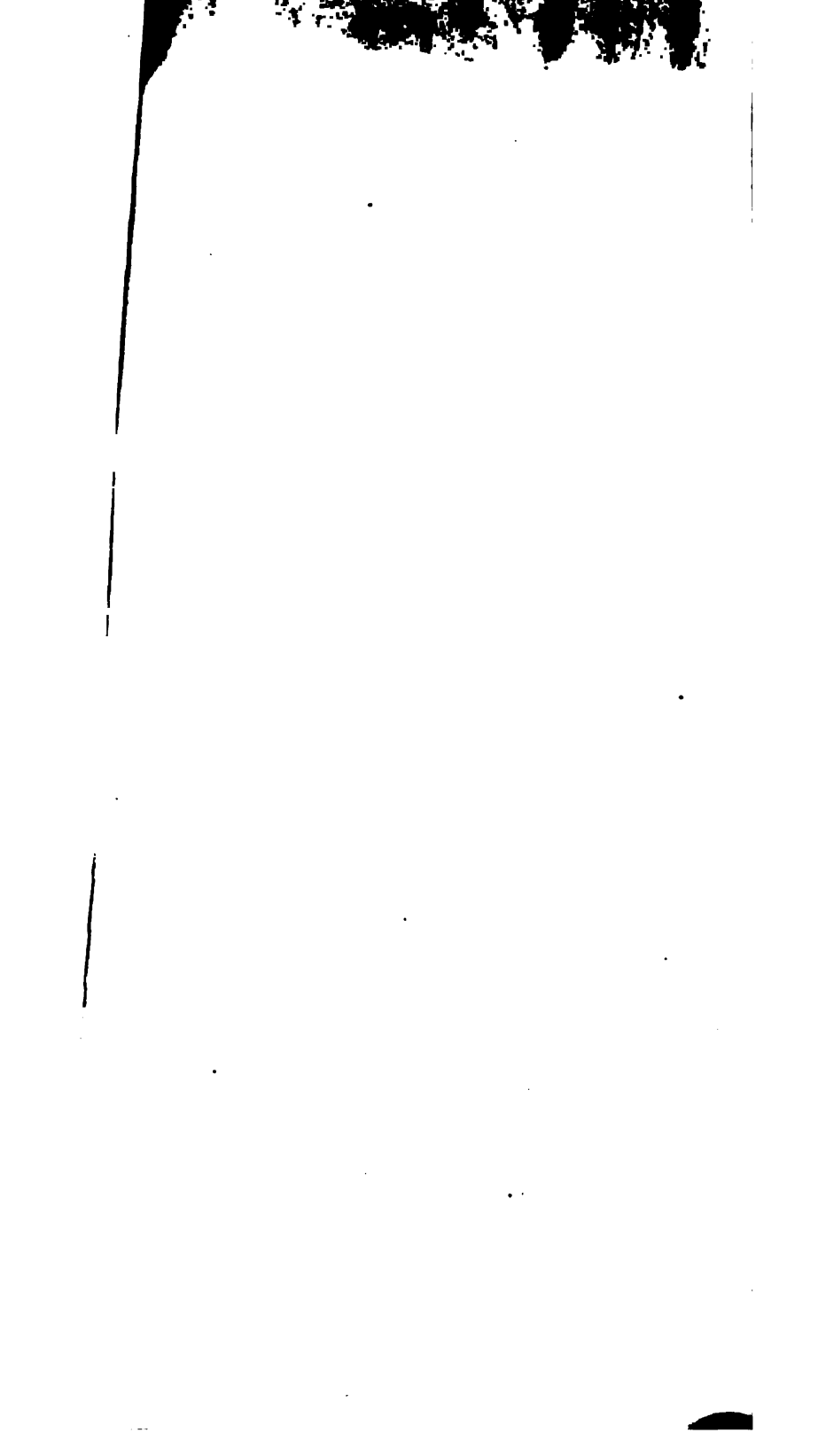
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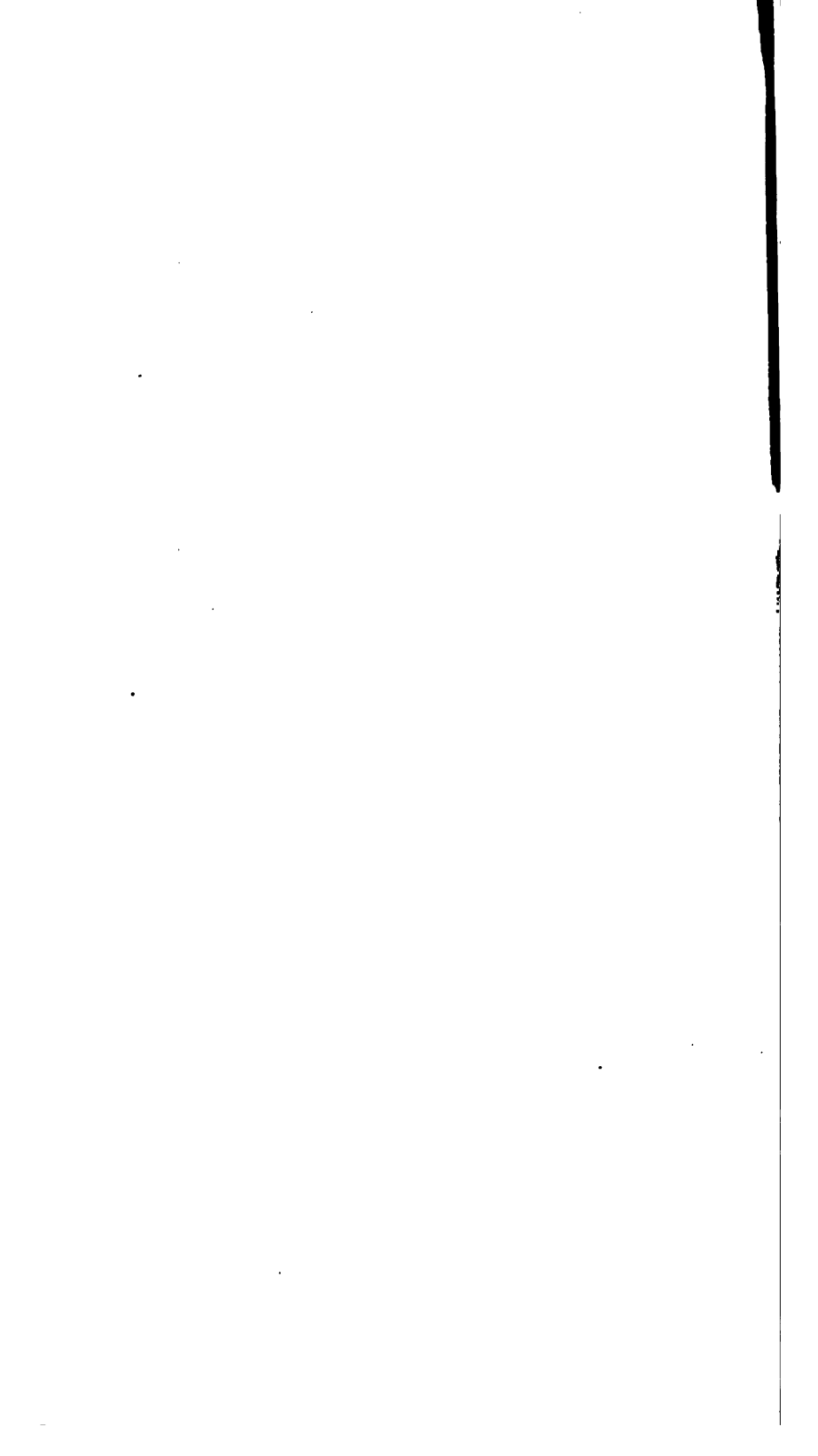
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THE

AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.

COMPILED AND ANNOTATED

BY A. C. FREEMAN,

SCHOLAR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.

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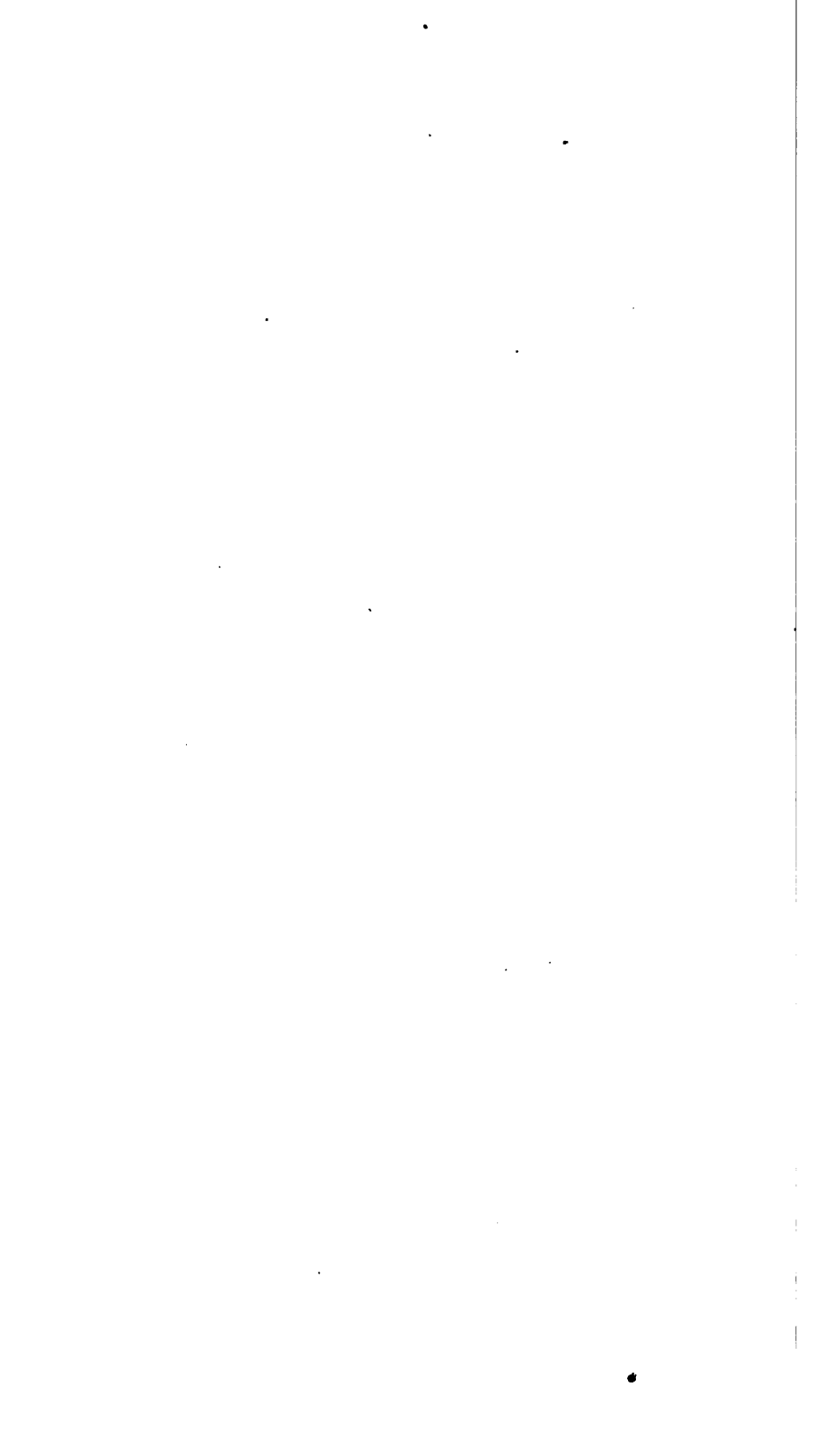
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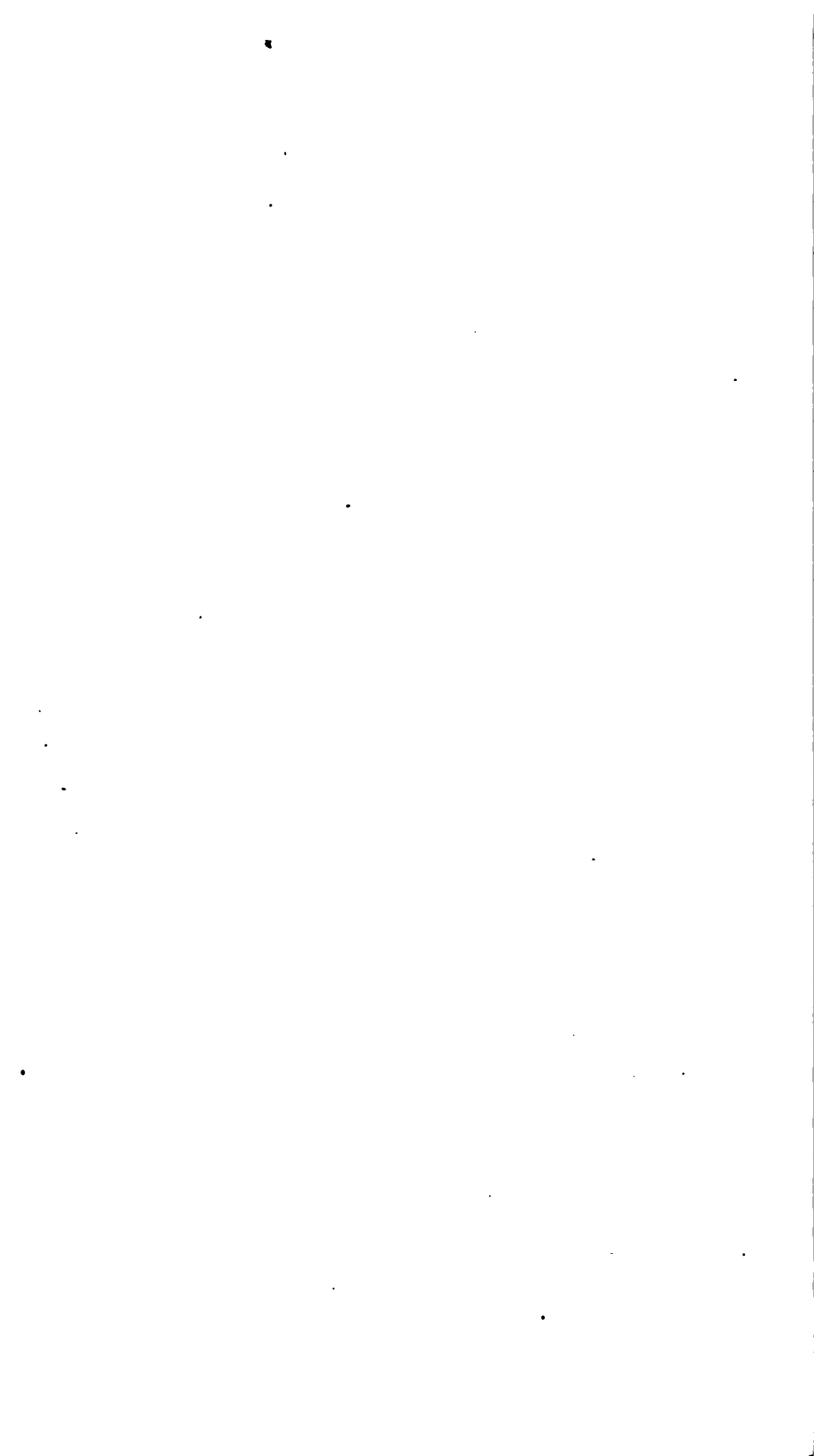
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AMERICAN DECISIONS.
VOL. XXXII.



CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

SMITH *v.* SHULTZ.

[1 SOAMMON, 490.]

APPLICATION FOR A NEW TRIAL IS ADDRESSED TO THE LEGAL DISCRETION of the court, and will not be granted, though the evidence might have justified a different result, if the court is satisfied that substantial justice has been done between the parties.

NEWLY DISCOVERED EVIDENCE IS NOT A GROUND FOR A NEW TRIAL where it is not conclusive in its character, or is merely cumulative.

TO CONSTITUTE THE TAKING OF ANOTHER'S PROPERTY A LARCENY, it must be accompanied with circumstances showing a felonious intention.

SLANDER. The opinion states the case.

S. McRoberts and A. C. French, for the plaintiff in error.

Brown and I. P. Walker, contra.

By Court, WILSON, C. J. This was an action on the case for slander. The plaintiff in the court below sued the defendant for charging him with having stolen his corn and oats. The defendant pleaded not guilty, and gave notice, under the statute, that on the trial of the cause he would prove that the plaintiff did take his corn and oats without his knowledge or consent; and also that he took it without his knowledge or consent, in the night-time, and fed it to his hogs and horses.

Upon this plea and notice the parties went to trial, and a verdict was found for the plaintiff. The defendant then moved the court for a new trial, upon the ground of newly discovered evidence. The affidavit which was made by the defendant, sets out that he believes that since the trial of the cause he has discovered that he can prove by Joshua Law, and one other wit-

ness, that the plaintiff told one, or both of them, that he did take the corn of the defendant, without his knowledge or consent. The court overruled the motion for a new trial, from which decision the defendant has taken this appeal. At common law, the decision of a court upon an application addressed to its discretion, can not be assigned for error, and such has been the uniform decision of this court. But by an act of the legislature, this principle of law has been changed, and an appeal will now lie from the decision of the court refusing an application for a new trial.

The question then is, has the court erred in the exercise of its legal discretion, in overruling the motion made in this case? This should be clearly made out to warrant a reversal of its opinion, upon a point, in relation to which it has the best opportunity of forming a correct opinion. A court will not grant a new trial when, in its opinion, substantial justice has been done between the parties, though the law arising on the evidence would have justified a different result; nor will it, upon the application of the defendant, afford him an opportunity of introducing newly discovered testimony, which is not conclusive in its character, or is merely cumulative. The evidence alleged by the defendant to have been discovered subsequently to the trial, would not, unaided by other circumstances, constitute a defense. The allegation in the declaration is that the defendant charged the plaintiff with larceny in stealing his corn and oats. The admissions of the plaintiff, expected to be proved, are, that he did take the corn of the defendant without his knowledge or consent. This is certainly good evidence as far as it goes; but it does not go far enough to establish upon the plaintiff the guilt of larceny. Every taking of the property of another, without his knowledge or consent, does not amount to larceny. To make it such, the taking must be accompanied by circumstances which demonstrate a felonious intention. No evidence of such intention is alleged to have been discovered, and the property may have been taken under a claim of title, or under other circumstances which would rebut all presumption of felonious intention. The bill of exceptions does not contain the testimony given on the trial; we can not therefore know what evidence, or whether any, was given by the defendant under his notice of justification. If none was given tending to justify, the court very properly overruled the motion for a new trial, because the newly discovered evidence does not, of itself, amount to a justification; and if, on the other hand, any testimony tending to make out this defense

was given on the trial which was had, then that subsequently discovered is merely cumulative, and would not have justified the court in awarding a new trial, in order to readjudicate upon a cause, with the result of which it is satisfied.

The decision of the circuit court is affirmed with costs.

Judgment affirmed.

NEWLY DISCOVERED EVIDENCE will not entitle to a new trial, if it is not conclusive in character, or is merely cumulative: *Chicago & Rock Island R. R. Co. v. McKean*, 40 Ill. 222; *Adams v. People*, 47 Id. 380; *Calhoun v. O'Neal*, 53 Id. 357; *Wood v. Echterbach*, 65 Id. 151; *Kendall v. Limberg*, 69 Id. 359; all citing the principal case with approval.

JUDGMENT WILL NOT BE REVERSED FOR ERROR ON THE TRIAL, in the matter of the admission or exclusion of testimony, if it is evident that substantial justice has been done between the parties: *Newkirk v. Cone*, 18 Ill. 454, citing the principal case. However reasonable this may be, it is evident that the point did not arise here. The case is cited to the same point in the dissenting opinion of Breese, J., in *Eason v. Chapman*, 21 Id. 40.

NEW TRIAL WILL NOT BE GRANTED where there is evidence to support the verdict, unless the great preponderance is against it: *Perry v. Smith*, 26 Am. Dec. 236; *Douglass v. Tousey*, 20 Id. 616. Nor will it be granted upon the ground of newly discovered evidence, unless it appear that the evidence discovered since the trial is material, and that no laches can be imputed to the party: *Myers v. Brownell*, 16 Id. 729 and note. The application for a new trial is one addressed to the sound discretion of the court: Id.

FELONIOUS TAKING is essential to constitute larceny: *Tyler v. People*, 12 Am. Dec. 176.

PICKERING v. ORANGE.

[1 SCAMMON, 492.]

OWNER OF A SAVAGE AND FEROCIOUS DOG, or other animal, who, with knowledge of its disposition, keeps the same negligently, is liable for the injury it is thereby enabled to do.

CASE. The opinion states the case.

W. J. Gatewood, for the appellant.

A. Cowles, contra.

By Court, BROWNE, J. This was an action on the case for keeping dogs which had been used to bite mankind, and to chase, worry, and kill other animals besides sheep, and which had killed divers sheep of the plaintiff. On the trial of the cause, the judge of the circuit court of Edwards county gave the following instruction: "That if defendant's dogs had been used to kill or worry sheep, and the defendant had notice thereof, then it was a question of law, and he was liable for all the dam-

ages they might do to the sheep of another after such notice; but if they had been used to kill or to chase, bite, and worry other animals, the property of another, or to bite mankind, and the defendant knew it, it was a question of fact for the jury; and if, therefore, they found the ferocity of the dogs to be such as to put a reasonable man upon his guard, and the defendant suffered, after notice, his dogs to go at large, then the defendant should be liable to the plaintiff for the amount of injury done." The jury found for the defendant below.

These instructions were clearly wrong. The law is well settled, that where a person negligently keeps dogs or other animals, which are known to him to be of a savage and ferocious disposition, the owner of the animals is accountable for all the injury they may do to others; and it is the duty of the owner of such animals to secure them, to keep them from doing mischief.

The judgment of the circuit court is reversed with costs, and the cause remanded, and a new trial awarded.

Judgment reversed.

OWNER OF DOG in the habit of worrying and injuring the stock of others who keeps it with notice thereof, is liable for the injury it commits: *Hinckley v. Emerson*, 15 Am. Dec. 383. See also *Loomis v. Terry*, 31 Id. 306, and note, 310.

MILLER v. HOWELL.

[1 SCAMMON, 499.]

ACTION FOR PURCHASE PRICE of a town lot can not be successfully resisted upon the ground of the failure of the vendor to comply with his promise made, as owner of the town in which the lot was situated, at the time of the public sale at which it was bid off, to erect a storehouse in the town and to build a bridge across a river that passed through the town.

MISREPRESENTATIONS ARE NOT FRAUDULENT unless they have been made with intent to deceive.

ASSUMPSIT. The opinion states the case.

U. F. Linder and John S. Greathouse, for the appellant.

Stephen A. Douglass, contra.

By Court, LOCKWOOD, J. This was an action of assumpsit commenced on a promissory note assigned to Howell, the plaintiff below, after it became due. After the note was read in evidence, Miller, the defendant below, proved that the note was given as the consideration of the sale of a town lot, which was bid off by him at a public sale of lots held by the assignors of the note,

and that the defendant received from them a bond to convey the lot upon the payment of the note. The defendant, to show that the consideration of the note had failed, offered to prove that the payees of the note, as proprietors of the town in which the lot was situated, publicly proclaimed, on the day of the sale of the lot, that they would build a storehouse in the town, two stories high, forty by twenty-four feet, by the first of August following the day of sale; and that they would construct a bridge across the Big Macoupin in the said town. Defendant further offered to prove that the payees of the note had failed to build the house and bridge. To the reception of this testimony, the plaintiff objected, and it was rejected by the court. The rejection of this testimony is assigned for error. This testimony was properly rejected. It did not tend to show a failure of consideration. The consideration of the note was the sale of the lot for the conveyance of which Miller holds a bond. If the payees of the note should fail to convey the lot at the time stipulated in the bond, or if they had no title to the lot when it became their duty to convey—either of these facts would constitute a failure of consideration of the note.

The declaration of the payees of the note of their intention to build a house and a bridge in the town, can in no wise be said to form the consideration of the note. Nor did the evidence offered amount to a fraud, because the defendant did not also offer to prove, that when the proprietors made the declarations of their intention to build in the town, they did it deceitfully. It does not appear from anything the defendant offered to prove, but that the proprietors made the declarations in good faith. Fraud can not exist without an intention to deceive. As the evidence offered did not tend to prove either failure of consideration or fraud, it was properly overruled.

The judgment is affirmed with costs. Judgment affirmed.

MISREPRESENTATIONS TO BE FRAUDULENT must be accompanied with an intent to deceive: *Tone v. Wilson*, 81 Ill. 533; *Weatherford v. Fishback*, 3 Scam. 175; *Owings v. Thompson*, Id. 505, all relying upon the principal case.

MILLER v. BLEDSON.

[1 SCAMMON, 530.]

ASSIGNEE OF THE INTEREST OF A JOINT PAYEE OF A NEGOTIABLE NOTE acquires by the assignment no right of action at law in his own name. In case of such partial assignments, the collection of the note must be enforced by an action in the name of the original payees. Nor does it affect the rule that the assignee is himself the other payee of the note.

ASSUMPSIT. The opinion states the case.

Cowles and Krum, for the plaintiff in error.

Bullock and Keating, *contra*.

By Court, LOCKWOOD, J. This was an action of assumpsit brought in the court below, by Bledsoe and Turpin against Miller, on a promissory note. On the trial of the cause, the plaintiff below produced and offered to read a note in evidence to the jury, in the following words, to wit:

“ Lower Alton, Ill., April 18, 1836.

“ Two years after date, I promise to pay to the order of M. O. Bledsoe and B. F. Turpin, two hundred and eighty dollars, value received, negotiable and payable at the Branch of the Illinois State Bank at Alton.

ANDREW MILLER.”

Upon the back of which note there is in writing the following indorsement:

“ I assign my interest in the within to M. O. Bledsoe, without recourse in any event.

B. F. TURPIN.”

A witness was sworn, who testified that the signature to said indorsement was in the handwriting of B. F. Turpin, one of the plaintiffs. To the reading of which note in evidence, the defendant objected, but the court overruled the objection and admitted the note. Other testimony was offered by the defendant and rejected, but it is unnecessary to state it, as it only tended to prove the fact, which was sufficiently established, that Turpin had parted with his interest in the note, to Bledsoe.

It is only necessary for this court to decide whether the note was admissible in evidence. At law a moiety, or any other portion of a promissory note, can not be so assigned as to enable the assignee to bring an action in his own name for his portion of the note. Had Turpin assigned his half of the note to a third person, that third person could not have united with Bledsoe, in bringing the action, for they would have to sue in different capacities, Bledsoe as payee, and the third person as indorsee. The same result would follow if Bledsoe had brought the action in his own name; he would have had to declare for a moiety of the note as payee, and for the remainder as indorsee. This would lead to much confusion and complexity in pleading. In order, therefore, to enable an indorsee of a note to bring an action in his own name as indorsee, the whole interest in the note must be assigned to him. The interests of an assignee of part of a note would doubtless be protected in a court of law,

but the action must be brought in the name of the payee or payees, who continue to be the legal holders of the note for the purpose of collection. The indorsement on the note can only be regarded as a private memorandum between the payees, and only vested in Bledsoe an equitable title to the money when collected. The court consequently decided correctly in receiving the note in evidence, and in rejecting the parol evidence. The judgment is affirmed with costs.

Judgment affirmed.

C A S E S
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

OFFUTT *v.* EARLYWINE.

[4 BLACKFORD, 400.]

SLANDER IS A TRANSITORY ACTION, and may be brought in one state for words spoken in another.

DEFENDANT IN SLANDER PLEADING THE TRUTH of the slanderous words has the burden of proof upon himself to establish their truth.

FELONIOUS INTENT IS ESSENTIAL TO CONSTITUTE A TAKING of another's property a larceny.

SLANDER. The opinion states the case.

C. B. Smith and C. H. Test, for the plaintiff.

J. S. Newman and D. Kilgore, *contra*.

SULLIVAN, J. The defendant in error brought his action of slander against the plaintiff in error in the Rush circuit court. The declaration alleges that the defendant below charged the plaintiff with stealing a horse. The defendant pleaded the general issue, and a special plea of justification, averring that on, etc., at, etc., in the state of Kentucky, the said Earlywine did feloniously steal, take, and ride away one sorrel horse, the property of Edward Linville. Issue on the first plea, and the general replication *de injuria*, etc., to the second. The cause was tried by a jury. Verdict and judgment for the plaintiff below.

During the progress of the trial, the plaintiff below introduced a witness by whom he offered to prove, that the defendant had spoken the slanderous words in the declaration mentioned, in the state of Kentucky, to which the defendant objected, unless he would first prove that some of the words laid in the declara-

tion, were spoken in the county of Rush. The court overruled the objection and admitted the testimony. After the testimony was closed, the defendant moved the court to instruct the jury, that if, from the evidence, they believed that it was "just as probable" that the plaintiff stole the horse named in defendant's plea of justification, as that he did not, they should find for the defendant. This instruction the court refused to give, but instructed the jury that they should weigh the testimony, and if it were more probable from the evidence that Earlywine stole the horse named in said plea than that he did not, they should consider the plea sustained, and find for the defendant. The plaintiff then moved the court to instruct the jury, that under the plea of justification, the defendant must prove that the plaintiff took the horse named in the plea, with a felonious intent. This instruction the court gave, to which opinion of the court in giving the last-named instruction, and refusing the former, the defendant excepted.

The special errors assigned are: 1. The court erred in permitting evidence to be given of words spoken in the state of Kentucky, no evidence of words spoken elsewhere having been proved; 2. The court erred in refusing the instructions asked by the defendant, and in giving the instruction asked by the plaintiff.

The words charged in the declaration, and proved to have been spoken, are actionable at common law. At the time they were spoken, the plaintiff below had a right of action against the defendant in the state of Kentucky, and the removal of the parties to this state did not divest that right. The action is transitory, and the defendant's liability follows him wherever he goes. This point was expressly settled in the case of *Stout v. Wood*, 1 Blackf. 71. In that case this court held, that slanderous words, actionable at common law, spoken in another state, will support an action here. It is not necessary that there should be proof of the speaking of the same or other slanderous words within the county, to give the court jurisdiction.

In the instructions given by the court to the jury on the application of the defendant, we see no error of which the defendant can complain. Proof that would raise a suspicion or probability merely of the plaintiff's guilt, would not be sufficient to sustain the defendant's second plea. The jury should be satisfied by proof, that the plaintiff was guilty of the offense set out in that plea, and it is their province on hearing the testimony to weigh it and decide upon it. The court ought so to have in-

structed the jury; and if either party is aggrieved by the instruction given, it is the plaintiff and not the defendant. Nor do we think the court erred in instructing the jury, that under the plea of justification the defendant must prove, that the plaintiff took the horse named in the plea with a felonious intent. The plea admits the speaking of the words, but justifies it because the plaintiff was guilty of the theft charged against him. The felonious intent is the gist of the offense: it is the very issue made by the plea. The defendant maintains that he had a right to speak the words laid in the declaration, because the plaintiff did feloniously steal, take, and carry away the property therein named. If the taking was not felonious, it was but a trespass, and would be no justification for speaking the words; if felonious, it is the ground of a good defense to the action, and the defendant having placed his defense on that point should prove it.

In an action of slander for charging the plaintiff with perjury, it was held, on a plea of justification, that the plea must be sustained by two witnesses, or one witness and strong corroborating circumstances: 6 Cow. 118. So, in another case for words charging the plaintiff with perjury, it was held by this court that the defendant, to support his plea of justification, was bound to show that the plaintiff had sworn falsely on the trial to a matter material to the issue. If the matter sworn to was immaterial, there was no perjury, and the charge was without foundation: *McGlemery v. Keller*, 3 Blackf. 488. If in an action for calling the plaintiff a thief, the defendant should justify because the plaintiff had stolen apples from the trees in his orchard, it is clear that the defense would be insufficient, because the words import a charge of trespass only, and not larceny.

These cases are cited to show, that a crime charged against another by a plea of justification in slander, requires the same kind of proof to maintain it, that is necessary to convict him of the crime. Whether the same strength of evidence is required, we are not now called upon to decide.

By Court. The judgment is affirmed with costs. To be certified, etc.

FELONIOUS INTENT IS AN ESSENTIAL INGREDIENT OF LARCENY: See *Smith v. Shultz*, ante, 33.

YEATES v. REED.

[4 BLACKFORD, 468.]

DAMAGES—**PROOF OF THE SPEAKING OF WORDS SLANDEROUS PER SE** entitles the plaintiff to some damages as a matter of right, where the words have been neither explained nor justified.

ATTEMPT OF THE HUSBAND TO PREVENT THE CIRCULATION OF THE SLANDER spoken by his wife can not be proved, in mitigation of damages, in an action of slander brought against the two.

SLANDEROUS WORDS LAID AS SPOKEN AFFIRMATIVELY are supported by proof that they were spoken in answer to a question.

INSANITY OF THE DEFENDANT MAY BE PROVED UNDER THE GENERAL ISSUE, in an action of slander.

GENERAL REPUTATION WITH RESPECT TO DEFENDANT'S SANITY is inadmissible in evidence, where insanity is sought to be proved.

SLANDER. The opinion states the case.

D. Kilgore, for the plaintiffs.

C. B. Smith, *contra*.

SULLIVAN, J. This was an action of slander brought by Reed and wife against Yeates and wife. The declaration alleges, that the wife of Yeates charged the wife of Reed with whoredom and adultery. Plea, not guilty, and verdict for the plaintiffs below. Motion for a new trial overruled, and judgment on the verdict.

On the trial below, the defendants asked the court to instruct the jury: 1. That the plaintiffs were bound to prove that some of the words proved to have been spoken, were uttered previously to the commencement of the suit; 2. That if the jury believed from the evidence, that the plaintiffs had sustained no damage from the speaking of the words, they might find for the defendants; 3. That Yeates' conduct in trying to prevent the circulation of the slanderous words, at the time they were spoken and afterwards, and his statement that the charge was false, may be considered by the jury in mitigation of damages. The court declined giving the instructions as asked, but instructed the jury that some of the slanderous words laid in the declaration, must be proved to have been spoken maliciously, and that if any words were proved to have been spoken that were slanderous in themselves, the jury might infer that they were false and malicious; that the jury should take all the circumstances of the case into their consideration in determining the malice; that they must believe from the evidence that the slander was uttered before the commencement of the suit; and that if it was so doubtful

whether the words were uttered before the commencement of the suit that they could not determine that fact, they should find for the defendants.

It further appears from the bill of exceptions, that about the time of the commencement of the suit, Mrs. Yeates was seen crying; that she was asked by a witness in the case why she was crying; and that in reply to that question, she uttered the words laid in the declaration. To this testimony the defendants objected, because the words were spoken in answer to a question, and the words in the declaration were laid as spoken affirmatively. The court overruled the objection and admitted the testimony, to which the defendants excepted. The defendants then offered to prove in mitigation of damages, that, at the time of speaking the words, Mrs. Yeates was considered by all her neighbors to be laboring under mental derangement, but the court refused the testimony, to which the defendants also excepted. The plaintiffs in error contend that the court erred in admitting the testimony objected to by them, and in refusing the testimony they offered, and that the court also erred in the instruction given to the jury, and in refusing the instructions asked.

The first instruction asked by the defendants was given by the court. The second and third were refused, and we think the court committed no error in refusing them. If the words spoken are actionable of themselves, the natural consequence is that damage has or will accrue to the person concerning whom they were spoken. The plaintiff is not bound to show by proof that he has sustained actual damage, nor is he required in such cases to be prepared to rebut by proof testimony tending to show that he has sustained none. By proving the actionable words he maintains the issue on his part; and the jury, unless the speaking of the words be explained or justified, is bound to give damages to some extent.

The efforts of Yeates to prevent the circulation of the slander, however laudable on his part, can in no wise mitigate the guilt of his wife. This we think too manifest to need further remark.

Nor do we think the court erred in overruling the objection of the defendants below to the testimony offered by the plaintiffs. Slanderous words should be stated as they were uttered, and if, in reply to a question, they were spoken affirmatively, they should be laid affirmatively in the declaration. But when they are uttered in the form of a question, they will not be admitted in support of a declaration charging them to have been spoken affirmatively, because, says the court in the case of *Barnes v. Hol- loway*, 8 T. R. 150, there is often a manifest distinction between

the same idea conveyed by words spoken affirmatively, and put interrogatively. If the words had been spoken in reply to a question by the plaintiffs, put with a design to procure their utterance for the purpose of suing the defendants, the plaintiffs could have maintained no action for words so spoken, because, "they can not afterwards complain of that as an injury which they have voluntarily occasioned." The latter principle was acknowledged by this court in the case of *Gordon v. Spencer*, 2 Blackf. 286. It has no application, however, to the case before us. The question, in reply to which the slanderous words in the present case were uttered, was not put by the contrivance of the plaintiffs, nor did the witness ask any question in reference to Mrs. Reed or her character; but in reply to the general question as to the cause of her grief, she spoke the words laid in the declaration and affirmed them to be true. We think the count was well supported by the proof.

The last point made by the plaintiffs is, that the court below erred in refusing the general opinion of the neighbors as proof that Mrs. Yeates, at the time of speaking the words, labored under mental derangement. Under the general issue in slander, the insanity of the defendant, at the time of speaking the words, may be given in evidence. The proof will be received in excuse or in mitigation of damages, according to the circumstances of the case: *Dickinson v. Barber*, 9 Mass. 225 [6 Am. Dec. 58]. And it may be, that partial mental derangement on the subject to which the words relate, may also be given in evidence under the general issue: *Horner v. Marshall's Adm'x*, 5 Munt. 466. But these are facts that must be proved as other facts are proved. Neighborhood reports or neighborhood rumors are not sufficient to prove either. Such testimony would confuse rather than enlighten the jury. Some facts, from their nature, can be proved in no other way than by reputation, but insanity, if it exists, may be established by direct proof. We see no error in the record on which to reverse this case.

By COURT. The judgment is affirmed with costs. To be certified, etc.

NO PROOF OF DAMAGE IS REQUISITE where words actionable *per se* are proved: *Gilman v. Lowell*, 24 Am. Dec. 96.

IN SLANDER THE SUBSTANCE of the words only need be proved: *Commons v. Walters*, 27 Am. Dec. 635, where it was held that proof that defendant said to plaintiff, "Are you not afraid, as you have perjured yourself?" sustained the allegation that the former said to the latter, "You are perjured."

MITIGATION OF DAMAGES, what may be proved in: See *Gilman v. Lowell*, 24 Am. Dec. 96, and note.

BARKELOO v. RANDALL.

[4 BLACKFORD, 476.]

WHEREVER A COURT OF INFERIOR AND LIMITED JURISDICTION issues process in excess of its authority, its judge, together with the party at whose instance he has acted, is a trespasser with respect to all acts done in execution thereof.

AN INFERIOR COURT ENABLED BY STATUTE TO ISSUE CERTAIN PROCESS after performance of prerequisites established by the statute, acts in excess of jurisdiction if it issues the process without those prerequisites having been performed. Thus where a statute enables a justice of the peace to issue a writ of domestic attachment upon the filing of a prescribed bond by the party applying for the writ, the justice acts in excess of jurisdiction if he issues the writ without the bond having been furnished, and is liable as a trespasser for the acts done under the writ.

TRESPASS *de bonis asportatis*. The opinion states the case.

C. B. Smith, for the appellant.

C. H. Test and J. Perry, *contra*.

SULLIVAN, J. This was an action of trespass *de bonis asportatis*. The defendants severed in their pleas. Randall pleaded that on the sixth of September, 1836, at, etc., the defendant, Kay, appeared before him, the said Randall, then and there being an acting justice of the peace in and for the county of Rush, and made and filed his affidavit, stating, among other things, that the said Barkeloo was justly indebted to said Kay in the sum of fifty dollars, etc., and that Barkeloo so concealed himself, that the ordinary process of law could not be served upon him, etc., whereupon said Randall issued his writ of domestic attachment directed to a constable of the proper county, commanding him to attach the goods and chattels of said Barkeloo; that the writ was delivered to the proper officer, and by virtue thereof the goods and chattels named in the declaration were duly attached, etc. Kay also pleaded that on, etc., at, etc., he appeared before said Randall, then and there being an acting justice of the peace in and for Rush county, and made and filed an affidavit stating, among other things, that said Barkeloo was justly indebted to him, said Kay, in the sum of fifty dollars, etc., and that Barkeloo so concealed himself that the ordinary process of law could not be served upon him; that said Randall thereupon issued a writ of domestic attachment directed to a constable of the county, commanding him to attach the goods and chattels of Barkeloo; that said writ was duly delivered, etc., and the goods and chattels of the

plaintiff in the declaration mentioned, were by virtue thereof attached; which is the same taking, etc. The defendants also pleaded the general issue.

To the special pleas of the defendants the plaintiff replied, that the said Kay sued out the writ of attachment, and said Randall issued the same, without any bond being filed by Kay, as required by law, conditioned for the due prosecution of the writ of attachment, and for the payment of all damages that might be sustained by the plaintiff, if the proceedings of Kay in the attachment should be wrongful and oppressive. These replications were by the court below, on general demurrer, adjudged bad; and final judgment was given for the defendants; whereupon the plaintiff appealed to this court.

The first section of the act authorizing domestic attachments provides, that when any person shall so abscond or conceal himself that the ordinary process of law can not be served upon him, it shall and may be lawful for his creditor or creditors, to appear before a clerk of the circuit court or justice of the peace, and make oath to that fact, and that the defendant is justly indebted to affiant, etc.; and upon filing such affidavit, and his bond with surety in double the sum demanded, payable to the defendant, and conditioned for the due prosecution of the writ of attachment, and the payment of all damages that may be sustained by the defendant, if the proceedings thereon shall be wrongful and oppressive, a writ of domestic attachment shall issue. By the second section of the act, each and every justice of the peace before whom such affidavit and bond shall be filed, is authorized and required to issue a writ of domestic attachment.

The questions made for our consideration are: 1. Was the filing of the bond an indispensable requisite to give the justice of the peace jurisdiction? and 2. Whether the action should not have been case instead of trespass?

When courts of special and limited jurisdiction exceed their rightful powers, the whole proceeding is *coram non judice*; and all concerned in such void proceedings are liable to an action by the party injured. In *Elliott v. Peirsol*, 1 Pet. (U. S.) 340, it is said that if a court act without authority, its judgments and orders are regarded as nullities. They are not only voidable but void. And in *Wise v. Withers*, 3 Cranch, 331, it is acknowledged to be a principle, that a decision of such a tribunal in a case clearly without its jurisdiction, can not protect the officer who executes it; but that the court and the officers are all tres-

passers. It is only while they act within the authority conferred upon them, that the law throws its protection around them. An excess of jurisdiction, as for instance issuing a warrant to apprehend without information on oath, will render the justice liable: *Vosburgh v. Welch*, 11 Johns. 175. And where there is an indispensable requisite to bring his official power into action, and that requisite be not complied with, his acts are null and void, and the justice of the peace, and the party procuring the act to be done, are liable to the party injured in an action of trespass: 1 Baldw. 571. Where a party procures an inferior magistrate to exceed his jurisdiction, and extend his powers to a case to which they can not lawfully be extended, he becomes a trespasser, and is amenable to the party injured: *Curry v. Pringle*, 11 Johns. 444. In the case of *Gold vs. Bissell*, 1 Wend. 210, it is held, that in cases where a summons is the regular process, a warrant without oath is irregular and void. Without the oath, the justice has no jurisdiction over the person of the defendant, and all parties concerned in an arrest under such process are trespassers. In *Vosburgh v. Welch*, above cited, which was an action of trespass brought against a justice of the peace for issuing an attachment against the goods of the plaintiff, as an absconding debtor, without legal proof of the fact of concealment as required by the statute, it was held that if a justice issues his attachment without oath, he must be considered as issuing it without authority, and is liable in an action of trespass *de bonis asportatis*. Numerous cases might be adduced to show, that where a court of inferior and limited jurisdiction acts without authority, or exceeds the authority conferred upon it, the court, the parties, and the officers who execute the decision, are all trespassers.

If in the present case, no affidavit had been filed as required by the statute, it would not have been pretended, but that the justice of the peace who issued the writ by which the property of the defendant was attached, and the party who procured it to be issued, were trespassers. Why may the bond be dispensed with, and not the affidavit? The statute places both on the same footing, and expressly provides that when both are filed, the justice of the peace shall be authorized to issue the writ. Our view of the law therefore is, that a justice of the peace who issues a writ of domestic attachment, by which the property of an absconding debtor is attached, without requiring a bond to be first filed according to the statute, and the party who procures

such writ to be issued without first filing his bond, are trespassers, and as such liable to the injured party.

By COURT. The judgment is reversed with costs. Cause remanded, etc.

JUDICIAL LIABILITY.—A magistrate who issues a search warrant, the preliminary requisites being omitted, acts *coram non judice*, and is liable in trespass to the party injured: *Grumon v. Raymond*, 6 Am. Dec. 200; *Flack v. Harrington*, 12 Id. 170. Generally all acts of an inferior magistrate done in excess of his jurisdiction render him liable in trespass: *Adkins v. Brewer*, 15 Id. 284; *Kelly v. Rembert*, 18 Id. 643. But errors of judgment will not render the inferior magistrate liable for injuries thereby occasioned: *Reid v. Hood*, 10 Id. 582. As to the liability of judges of superior courts, see *Yates v. Lansing*, 6 Id. 290, and note, 303.

FOLEY v. COWGILL.

[5 BLACKFORD, 18.]

THERE CAN BE NO DELIVERY AS AN ESCROW OF A DEED TO THE OBLIGEE therein, but in all such cases the condition upon which the deed was to take effect is a nullity, and the delivery is absolute.

MISREPRESENTATIONS AS TO THE VALUE OR QUANTITY OF A COMMODITY in market, where correct information on those subjects is equally within the power of both parties to a contract which is induced thereby, does not, in contemplation of law, constitute fraud.

PAROL EVIDENCE IS INADMISSIBLE TO VARY THE TERMS of a written agreement.

COVENANT. The opinion states the case.

J. L. Ketcham and C. P. Hester, for the plaintiff.

T. A. Howard, A. Kinney, and M. Hulett, contra.

DEWEY, J. This was an action of covenant. The declaration contains two counts. The first alleges that the defendant covenanted to deliver to the plaintiff from eight to fifteen hundred fat hogs, at a certain time and place; for which the plaintiff agreed to pay, on delivery, at specified prices according to their weight; that the plaintiff was ready at the time and place to receive and pay for them, but that the defendant did not deliver, or offer to deliver them at the time and place designated, or at any other time or place, and that he had notified the plaintiff some time before that he would not deliver them, but would break his contract. The second count is in substance the same as the first, setting out the contract *verbatim*, and omitting the averment of the previous notice given by the defendant, that he would not perform his covenant.

The defendant pleaded several pleas. His second plea alleges, that the deed of covenant in the declaration mentioned was delivered to the plaintiff as an escrow, setting out the contingency on which it was to become binding on the defendant, which, it is averred, had never happened, and concluding that therefore the covenant was not his deed.

The substance of the third plea is as follows, that at the time of making the covenant, the plaintiff was a large dealer in pork, well acquainted with its value, and with full knowledge that its price was then increasing in the various markets of the United States; that he also knew the defendant was, from his age, a man of retired habits and ignorant of the value of pork and of the probable rise in the price of that commodity; that the plaintiff, after professing great friendship for the defendant, solicitude for his welfare, and confidence in his integrity, expressed a wish to unite with him in the purchase of a large number of hogs; that to induce the defendant to enter into the speculation, and make the contract declared on, the plaintiff repeatedly assured the defendant that hogs were abundant, and could be purchased readily for two dollars or two dollars and fifty cents, per one hundred weight, and that if the defendant could not purchase them at those rates he would give up the contract to him at any time; that the defendant confiding in these professions and representations, and relying upon the promise of the plaintiff to give up the contract, executed the same; the plea then alleges that hogs were very scarce, and of much greater value than two dollars and fifty cents per one hundred weight, to wit, of the value of six dollars, and that they soon afterwards became still more valuable, so that it was with difficulty they could be had at any price; that this state of things continued until after the period when the contract was to have been performed; that the plaintiff knew the above representations by him made to be false, and that the defendant believed them to be true.

The fifth plea is the same in substance as the third.

The plaintiff demurred to these three pleas. The demurrer to the first was sustained, and those to the other two were overruled. Final judgment for the defendant.

The plea alleging the delivery of the covenant to the plaintiff himself as an escrow is bad, and the demurrer to it was properly sustained. A deed may be delivered to a stranger to take effect upon a condition to be subsequently performed; but if it be delivered to the obligee upon such contingency the condition is a

nullity, and the delivery absolute: Hob. 246;¹ *Thoroughgood's case*, 9 Co. 136; Co. Lit. 36 a; 2 Thom. Co. 190, and n. 15; Cro. Eliz. 520;² Id. 884;³ 2 Stark Ev. 271; Shep. Touch. 59; *Fairbanks v. Metcalf*, 8 Mass. 230.

The only parts of the third and fifth pleas entitled to notice, are the allegations that the plaintiff made false representations as to the value and quantity of hogs in market, and that he promised to deliver up the covenant provided the defendant could not purchase them at certain prices. However justly the moralist may censure the address sometimes resorted to by men of keen business habits to effect advantageous contracts, misrepresentations as to the value or quantity of a commodity in market, when correct information on those subjects is equally within the power of both contracting parties with equal diligence, do not in contemplation of law constitute fraud: Chit. Con. 113, 223. Indeed, the extent of supply and demand relative to an article of commerce, upon which its value principally depends, is in a great measure a matter of opinion, upon which different minds may form different conclusions; to deprive the better informed, more enterprising, and more cautious party of the benefit of his contract, on account of representations, of the correctness of which the other party ought to judge for himself, would tend more to encourage ignorance, sloth, and recklessness, than to repress dishonesty.

The averment as to the conditional promise of the plaintiff to give up the contract, is an attempt to vary the terms of the covenant by parol matter, and clearly inadmissible. The third plea is also objectionable in professing to answer the whole declaration, when in fact it embraces only the second count. We think the circuit court erred in overruling the demurrer to the third and fifth pleas.

By Court. The judgment is reversed with costs. Cause remanded, etc.

MISREPRESENTATION, THE FALSITY of which might have been discovered by the exercise of proper diligence, will not invalidate a sale: *Williams v. Hicks*, 19 Am. Dec. 693 and note.

1. *Holford v. Parker*.

2. *Wyddon's case*.

3. *Williams v. Green*.

MARTIN v. BLISS.

[5 BLACKFORD, 35.]

WHETHER A RIVER IS NAVIGABLE is a question of fact, that in no manner depends upon whether or not the legislature has declared the river navigable.

LOSS CAUSED BY A PERMANENT IMPEDIMENT LAID ACROSS A NAVIGABLE RIVER is chargeable to the person who has placed it there, though the loss happened in an attempt to pass property which was being taken down the river, across the impediment, which it was known to the person attempting to result in loss.

CASE IS THE PROPER REMEDY for injuries occasioned by the obstruction of a highway.

CASE. The opinion states the case.

R. A. Lockwood and H. Cooper, for the plaintiffs.

I. Naylor, contra.

• DEWEY, J. This was an action on the case for obstructing Eel river by a mill-dam, in consequence of which Bliss, the plaintiff below, lost a quantity of timber which he was floating to market. The declaration alleges Eel river to be a navigable stream and public highway. Plea, the general issue. Verdict for plaintiff, motion in arrest of judgment overruled, and final judgment on the verdict.

The alleged errors consist in the refusal of the circuit court to give the following instructions to the jury on the motion of the defendants below, and in overruling the motion in arrest of judgment:

1. That as neither the territorial nor state legislature had ever declared Eel river navigable, the plaintiff was not entitled to recover.

This charge was properly refused by the court. The navigableness of Eel river was one of the facts put in issue by the pleadings, and its existence was correctly left to the jury upon the evidence before them. Nature is competent, we should imagine, to make a navigable river without the help of the legislature.

2. That if the loss of the plaintiff's timber upon the dam of the defendants was occasioned by its being "a raft of long logs," which the plaintiff himself believed he could not float over the dam, he was not entitled to sustain his action.

We do not consider this instruction as involving the question, whether a person who, by the unlawful act of another, has received an injury which he might have avoided by prudent con-

duct, can sustain an action for such injury; but that it amounts simply to this—that if the length of the plaintiff's timber was such, and so believed to be by him, that it could not pass the dam, when, had it been shorter, it might have floated over it in safety, he was not entitled to recover against the defendants for the loss of his timber occasioned by their obstruction of the navigation of the river.

The court committed no error in refusing this instruction. The plaintiff's right of action did not depend upon the shape, dimensions, or quantity of his timber, but upon the fact of loss of, or injury to, his property such as it was, occasioned by an impediment to the navigation of the stream erected by the defendants. Nor could the plaintiff's belief or opinion as to the practicability of passing the mill-dam with his property affect the responsibility of the defendants for such loss or injury. The obstruction might have been so complete as to render it certain that no description of property could pass it. Had such been the fact, and the plaintiff perfectly aware of it before he committed his timber to the river, it will scarcely be seriously contended that it could constitute a good defense to an action for an injury caused by such obstruction. Could such a defense avail, it would be easy to destroy the navigation of many rivers with impunity.

3. That "case" would not lie "for obstructing a highway, unless the highway be such in the common law sense of the term."

We think this charge too was rightly refused. If there be any highway which is not such, "in the common law sense of the term," we know of no reason why an action on the case will not lie for an injury occasioned by unlawfully obstructing it. Nor does the record show any evidence which could render this instruction pertinent, however various may be the meanings of the term highway.

In support of the motion in arrest of judgment, it is urged that the declaration contains no averment that Eel river was navigable at the place where the mill-dam was erected. Whether this objection, were it founded in truth, could be sustained after verdict need not be decided, as we think the averment is substantially made.

By COURT. The judgment is affirmed with five per cent. damages and costs.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

CASE ET AL. v. WOOLLEY.

[6 DANA, 17.]

- PARTIES TO A BILL TO ENFORCE A LIEN** should include all the owners of the subject of the lien; but the non-joinder of one of the owners ceases to be objectionable if the lien is released and no decree is made affecting his interest.
- ACTUAL NOTICE TO THE MASTER OF A BOAT** of the existence of a lien against it, operates as constructive notice to its owners.
- IF CREDITORS WHO LIBEL A BOAT HAVE NO NOTICE** of a pre-existing lien, a purchaser under their judgment becomes subrogated to their rights, and acquires title free of such lien though he had actual notice of it.
- DISTRICT COURT OF THE UNITED STATES** is of special and limited jurisdiction, and its judgment will be deemed void unless the record shows that it had jurisdiction.
- MARITIME JURISDICTION** is, by the constitution and laws of the United States, vested in its district courts, concurrently, however, with the common law courts, in cases wherein the common law remedy is adequate and proper.
- A CIVIL MARITIME CASE** arises on the sea, or from some act or contract pertaining to its commerce or navigation.
- A CIVIL CASE ARISING WHERE THE TIDE EBBS AND FLOWS**, though within a county, is a case of maritime or admiralty jurisdiction, within the meaning of our national constitution and laws.
- A MARITIME CLAIM FOR SERVICES** must show that such services were wholly or essentially performed where the tide ebbs and flows.
- MASTER OF VESSEL HAS NO LIEN FOR HIS SERVICES** by the maritime law.
- AN ACCOUNT FOR SUPPLIES FURNISHED A VESSEL** at a place where the tide ebbs and flows is a maritime claim.
- THOUGH A LIBEL FILED BE NOT FOR A MARITIME LIEN** and therefore not sufficient to give the admiralty court jurisdiction, such court will acquire jurisdiction if another libel, filed by an intervening party, be for a maritime claim.

JURISDICTION IN PERSONAM as well as *in rem* is vested in the maritime courts of the United States.

SEAMEN OR MARINERS, other than the master, are entitled to a lien on the vessel for services rendered on the high seas, or where the tide ebbs and flows.

LIEN FOR REPAIRS DONE OR SUPPLIES FURNISHED a maritime vessel in a foreign port, is implied by the law of the United States.

A HOME PORT is any port in which the owner happens to be with his vessel; but, in England, a home port is any port within the jurisdiction of the common law courts of that island, if the owner resides in that country.

LIEN FOR REPAIRS DONE OR SUPPLIES FURNISHED TO A VESSEL does not exist if the owner was present at the port when and where the repairs were made or supplies furnished.

WHERE COURT HAS JURISDICTION IN PERSONAM, its decree will be presumed valid, and will not be deemed void because it orders a sale of the property as in proceedings *in rem*. Though no lien existed, a decree of sale made when all the owners are before the court, is binding on them and will transfer title if the property be sold in pursuance thereof.

Duncan, for the appellants.

The appellee for himself.

By Court, ROBERTSON, C. J. A. R. Woolley, whose slave, named William Gorden, had, without his consent, been taken (in violation of the statutes of this state, of 1824, 1 Stat. L. 259, 260), on board the steamboat Lancaster, from Louisville in Kentucky, the place of his residence, to New Orleans, whence he had fled to some place unknown, so as to have escaped vigilant search and inquiry after him, proceeded by bill in chancery in the chancellor's court for the said city of Louisville, to attach the said boat, for the purpose of subjecting it to the lien given by the said statutes for the damages which he had sustained.

Wilson W. Hinkle, who was made a defendant, admitted that he was owner of the boat at the time of the alleged abduction, but averred that one Grooms was master, and in receiving William Gorden on board, as a freeman, had acted without his knowledge or authority. And it appearing that Charles H. Henshaw, who had bought the boat at New Orleans under an order of sale by the judge of the United States court for the eastern district of Louisiana, made between the abduction of the slave and the filing of the bill, on the libel of Joseph Reed, as clerk for said boat, and upon other intervenient libels, for supplies furnished to it by other libelants at New Orleans, and for other demands against it, had sold one fourth thereof to said Reed, and one fourth to Loyal Case, and one fourth to Theodore Segond. Reed and Case, upon their petition, were made defendants, and thereupon replevied the boat; and having thus

obtained restitution of it from the officer who had attached it, in obedience to the chancellor's order in this case, answered the bill, and relied for defense on the purchase by Henshaw without notice of Woolley's lien, given by the statutes before referred to, and upon their own purchase, without notice from Henshaw.

The chancellor, being of the opinion that Woolley was entitled to damages, and also to an available lien on the steamboat Lancaster, notwithstanding the decree and sale in Louisiana, and a jury, impaneled for that purpose, having fixed the amount of damages at one thousand dollars, decreed that Hinkle, Reed, and Case should pay that sum and the costs of the suit. The object of this appeal is to reverse that decree, upon various grounds assigned for error.

1. The appellants contend that Henshaw ought to have been made a party, by the appellee; and certainly he would have been a necessary party, had there been no release of the lien on the boat by the substitution of the bond of the appellants, Reed and Case, and had there been any final proceeding *in rem*, or otherwise affecting his interest. But as the decree was only *in personam* against Hinkle, on his original liability for his unlawful acts, and against Reed and Case in consequence of their bond given voluntarily, in consideration of their claim of interest in the boat, we are of the opinion that Henshaw was not an indispensable party, and that if it was material to the appellants that he should have been made a party, it was their duty, and not that of the appellee, to bring him before the court.

2. The next ground taken by the appellants in opposition to the decree applies to Reed and Case alone, and is, that, though there is no proof that they were purchasers for a valuable consideration, or had paid anything for their interest in the boat prior to notice of the appellee's lien, nevertheless, Henshaw, of whom it is admitted that they bought one fourth part each, was such a purchaser as to be entitled to hold the boat unincumbered by that lien, and that therefore, as, upon that hypothesis, a decree against Henshaw, had he been a party, would have been erroneous, the chancellor had no right to render a decree against them on the ground of their derivative claim. To this the appellee replies: first, that Henshaw had implied notice of the lien before he had paid the consideration; and, secondly, that the district court of Louisiana had no jurisdiction, and that the sale to Henshaw was therefore void. These points were thus decided by the chancellor in an elaborate opinion, in which he endeavored to sustain each of them by imposing argument

and the array of much supposed authority. But, after giving the most respectful consideration to the arguments of the chancellor, and to the cases cited in his learned opinion, we can not concur with him in his conclusion respecting either of those two points.

1. As to the notice. Although we concur with the chancellor in the opinion that actual notice to the master of the boat by the service of process upon it, was constructive notice to Henshaw, as the owner, or one of several owners, and although we also concur with him in the opinion that notice thus given, when, of the price agreed to be paid by Henshaw for the boat, as much as the amount of the appellee's claim remained unpaid, was as effectual so far as his lien was concerned, as the like notice before the sale under the Louisiana decree, nevertheless, if that decree was valid, we are of the opinion that, according to the principle settled by this court in the case of *Helm v. Logan's Heirs*, 4 Bibb, 78, unless the creditors, upon whose libels the decree for selling the boat was rendered, had notice of the appellee's lien, notice to the purchaser under their decree, even before or at the time of the sale, would not affect his purchase; because by becoming the purchaser, he was subrogated to the rights of the creditors, and held as they would have been entitled to hold, had they or any of them purchased the boat under their own decree without any notice of the lien. And it does not appear that they, or any of them, ever had any notice of the appellee's lien.

2. The question as to jurisdiction is far more important and difficult. As the district court of Louisiana is one of special and limited jurisdiction, unless the record, as exhibited in this case, shows that it had cognizance of the claims upon which it adjudicated, this court should treat its proceedings and decree as void, for want of legal authority in the court. And no extension of accustomed comity would allow any other judicial course.

There is no pretense for the authority exercised by the district court, unless the case it decided was one of maritime jurisdiction; and, if the case were of that character, there can be no doubt that it was not *coram non judice*; for the federal constitution gives to the federal courts jurisdiction in all admiralty and maritime cases, and the judiciary act of 1789 delegates to the district courts of the United States "exclusive original cognizance (as between them and the circuit courts) of all causes of admiralty and maritime jurisdiction," concurrently, however, with courts of common law, in cases in which a common law remedy may be adequate and proper.

A civil maritime case being one arising on the sea, or from some act or contract concerning the commerce and navigation thereof, and the Lancaster never having navigated the high sea, nor, as far as appears, being designed for any other navigation than that of the Mississippi river and its tributaries, not nearer the mouth of the former than the city of New Orleans, we have no doubt that, though every channel in which the sea ebbs and flows is deemed and denominated by law a part of the sea, and though it has been settled by the supreme court of the United States that there is an ebbing and flowing of the sea tides at New Orleans, nevertheless, as, according to the common law, as understood and practiced in England by courts of common law when our federal constitution was adopted, a civil case arising within the body of a county, and therefore under the guardianship of the common or local law, was cognizable in a court of common law only, the district court of Louisiana had no maritime jurisdiction, if the federal convention should be understood as referring to the then existing common law practiced in England, for a definition of the terms "admiralty and maritime," as used in the constitution; for it is evident that, for many years prior to the year 1787-8, the common law courts of England had claimed, and been permitted generally, to exercise exclusive cognizance over all such cases.

But it must be admitted that the admiralty courts of England always insisted that, notwithstanding the statutes of 13 and 15 Rich. II., and other positive enactments, they had a legal right to jurisdiction, either exclusive or concurrent, in this contested class of cases. And it seems to have been understood, also, that our colonial courts of vice-admiralty exercised jurisdiction in all such cases without question. Upon these grounds, fortified by the opinion that the maritime, and not the common law, courts of England asserted the true doctrine as to admiralty jurisdiction, antecedently to 1788, some of the circuit courts and the supreme court of the United States have decided that a civil case arising where the sea ebbs and flows, even though it may be within a county, is a case of admiralty or maritime jurisdiction, as understood and intended by the framers and adopters of the federal constitution: *De Loro v. Boit*, 2 Gall. 398; *Plummer v. Webb*, 4 Mason, 380; *Drinkwater v. The Brig Spartan*, decided in Maine and published in the *American Jurist*, No. 5, p. 26; *The Steamboat Thomas Jefferson*, 10 Wheat. 428; 6 Cond. 173; and *Peyroux et al. v. Howard et al.*, 7 Pet. 324.

These decisions, and especially the two last, by the supreme

court of the United States, have, in our opinion, settled this controverted question authoritatively, so far as this court and the case we are now considering may be concerned. Nevertheless, it is clear and undeniable that Reed's libel, for services as clerk of the *Lancaster*, did not present a maritime claim; because it is well settled that, to entitle his demand to maritime privilege, his services must have been performed, either altogether, or essentially, on tide water; and his libel and the accompanying account not only did not show this, or any fact from which it might be presumed, but clearly imply the contrary, as they conduce to the deduction that his services, as clerk, were rendered between Louisville, in this state, and New Orleans, in Louisiana. Moreover, had the service been maritime, the law would not have implied a lien in favor of the master for his wages: *Steamboat Orleans v. Phœbus*, 11 Pet. 184.

But if any other libel, filed by an intervening party, exhibited a maritime claim, such libel alone gave the district court maritime jurisdiction; and, therefore, however erroneous the decree as to other claims, or upon other libels, may have been for want of jurisdiction over them, still, as the court had cognizance, to some extent, the decree is not void, and can not, therefore, be incidentally or collaterally disregarded as long as it remains unreversed. The libel of Lazet and Amelung, and that of Tucker and Craig, founded on open accounts, show, *prima facie*, that the claims of these libelants arose chiefly from supplies and stores furnished for the *Lancaster* by them at New Orleans; and, therefore, as the services for which they sought compensation were performed altogether where the tide ebbed and flowed, their claims were maritime, and cognizable by the district court of Louisiana, according to the cases of *The General Smith*, 4 Wheat. 438; and 4 Cond. 493, and of *The Thomas Jefferson*, and of *Peyroux et al. v. Howard et al.*, *ubi supra*.

As maritime cases are regulated chiefly by the doctrines of the civil law, according to which a creditor, on a maritime contract, was entitled to an implied lien on the vessel of the debtor, there might be some ground for arguing that an instance court, when proceeding *civiliter*, has no jurisdiction *in personam*, and, therefore, can have no cognizance of a civil case, unless there be a resulting lien, and unless, therefore, the suit be, according to the civil law, a libel *in rem*. But, though this question seems to have been intentionally pretermitted and reserved for future consideration by the supreme court of the United States, in the case of *Ramsay v. Allegre*, 12 Wheat. 611, and 6 Cond., it should,

in our opinion, be deemed to be authoritatively settled in favor of a maritime jurisdiction *in personam* alone, by the incidental declaration to that effect in the previous case of *The General Smith*, and the express decision to the same effect, by the same court, in the subsequent case of *Peyroux et al. v. Howard et al.*, already cited—to the last of which it can not be objected, as it might be to the first, that the opinion of the supreme court, though explicit and unhesitating, was not, as to the point we are now considering, judicial and authoritative; for the only question debated in this latter case was, whether maritime jurisdiction *in personam* being conceded, the district court had also cognizance *in rem*; and the supreme court decided that, though in that case the law maritime gave no lien, and even though, also, the local law of Louisiana could not give jurisdiction to the federal court, yet having, independently of the local law, jurisdiction of the case *in personam*, that court had authority to enforce a lien given by that law, and, therefore, had a consequential jurisdiction *in rem*. It is evident that, according to the argument of the supreme court, the lien given by the statute of Louisiana did not confer maritime jurisdiction on the district court of the United States, and that, therefore, independently of the lien, that court had such jurisdiction, and, of course, *in personam* only; and that the court thus having maritime jurisdiction over the parties had a right to proceed, and to decide the case according to all the law, whether international or merely local, which operated upon their contract then litigated. Upon that point the court was not only unequivocal, but unanimous, and, therefore, their decision is authoritative, so far as the inferior federal courts are concerned, and so far, consequently, as it may affect this case as now presented in this court.

We are inclined to infer that the congress of 1789 entertained the same opinion as to the existence of a maritime jurisdiction *in personam*, even though the *lex maris* gave no lien, and, therefore, authorized no proceeding *in rem*; for, in the judiciary act of 1789, the proviso in favor of a concurrence of maritime and common law jurisdiction in an undefined class of cases, was altogether proper and consistent, upon the hypothesis that there may be maritime contracts without maritime liens; and as to which contracts, though maritime courts might be entitled to jurisdiction, courts of common law should also have concurrent cognizance, because such cases may be decided exclusively upon rules and principles of the common law—there being no question of civil or maritime law which a court of common law would

have no authority to decide. And we are, moreover, inclined, with Mr. Chancellor Kent and with Mr. Justice Story, to the opinion that, in such cases especially, courts maritime and courts of common law would, independently of the proviso in the act of 1789, be entitled to a concurrence of jurisdiction according to the united recognitions by each of those classes of courts, which may be inferred from the practice and decisions in both, as well before as since the adoption of our federal constitution.

But though, according to the foregoing views and authorities, water which ebbs and flows from the high sea should here be deemed a part of the *altum mare*, and though a contract made at such a place, for supplying a ship or steamboat, may be maritime in its nature, and, therefore, the subject of maritime jurisdiction *in personam*, nevertheless the law of the contract may give no implied lien on the vessel, and, therefore, the court may have no jurisdiction *in rem*; and in such a case, of jurisdiction *in personam* only, a decree *in rem* would be erroneous, at least. And it is argued, in this case, that even though some of the libels may, *prima facie*, have exhibited cases of maritime jurisdiction *in personam*, still the law did not in any of them imply a lien on the boat, and that, therefore, the decree against it, and the consequent sale of it, passed no title to it, and, consequently, could not have affected the appellee's lien upon it.

Though it is admitted that, for obvious and peculiar reasons, seamen or mariners, who make no special contract to the contrary, are entitled to an implied lien on the vessel for services rendered on the sea, or substantially thereon, or on the flux and reflux thereof, and though, also, Lord Mansfield said, in *Rich v. Coe*, Cowp. 636, and in *Farmer v. Daves*, 1 T. R. 109, that "a person who supplies a ship with necessities has not only the personal security of the master and owners, but also the security of the specific ship," yet it was the established doctrine in England, as early as 1787, and before, first, that there is no such implied lien in favor of the master for his services, because, nothing appearing in the contract to the contrary, the law presumes that he trusted the personal credit of his employer; and, secondly, that material-men, or those who had made repairs, or furnished supplies or materials, have no implied lien on the ship repaired or supplied, unless the repairs were done, or the supplies furnished, at the instance of the master in a foreign port, or on the high sea, in the absence of the owner; because, as is said, the law should give a lien on the vessel when there is no other security for necessities which it needs, and, therefore, if repairs be made

or supplies be furnished within the jurisdiction of the local government of the owner, the law should presume that those necessities were furnished upon his personal credit alone, except in case of a shipwright who holds the ship until his services are compensated, and who, in such a case, has, by the common law, a right, like the tailor or blacksmith, to retain the possession of the thing upon which his skill and labor have been expended, until the owner will pay him a just compensation; but such a common law lien is gone as soon as the thing be delivered to the owner, or he shall have been permitted to take it away.

In *Wilkins v. Carmichael*, 3 Doug. 101,¹ decided only two years after that of *Rich v. Coe*, Cowp. 636, Lord Mansfield himself said: "Work done for a ship, in England, is supposed to be on the personal credit of the employer. In foreign parts, the master may hypothecate the ship;" and he might have added that, therefore, in foreign parts, the law would imply a lien on the ship. And the same principle was virtually recognized in the cases of *Hoare v. Clement*, 2 Show. 338, and *Justin v. Ballam*,² Salk. 34, and *Watkinson v. Barnardiston*, 2 P. Wms. 367, and *Burton v. Snee*, 1 Ves. 154. In this last case, Lord Hardwicke said: "Certainly, by the maritime law, the master has power to hypothecate both ship and cargo for repairs, etc., during the voyage, which arises from his authority as master, and the necessity thereof during the voyage, without which both ship and cargo would perish; therefore, both that and the law of this country admit such a power. But it is different where the ship is in port *infra corpus comitatus*, and the contract for repairs, etc., made on land in England; then the rule of that law must prevail." And in *Watkinson v. Barnardiston*, *supra*, Sir Joseph Jekyll, master of the rolls: "If the ship be in the river Thames, and money be laid out there, either in repairing, fitting out, new rigging or apparel of the ship, this is no charge upon the ship; but the person thus employed, or who finds these necessities, must resort to the owner thereof for payment; and in such a case, in a suit in the court of admiralty, to condemn the ship for non-payment of the money, the courts of law will grant a prohibition. * * But it is true that, if at sea, where no treaty or contract can be made with the owner, the master employs any person to do work on the ship, this, for necessity and encouragement of trade, is a lien upon the ship, and in such case the master, by the maritime law, is allowed to hypothecate the ship." But in *The John*, 3 Rob. Ad. 288, Lord Stowell allowed merchants of London,

1. 1 Doug. 101.

2. *Justin v. Ballam*.

who had furnished the master of an American ship with stores on the Thames, to come in for contribution out of the proceeds of the sale of the ship, under an order of the court of admiralty in England.

It seems to us that the principle of the doctrine thus settled in England is not that intimated by Lord Hardwicke, to wit, that the contract being made in England, the common law alone applied to it; but is that stated by Sir J. Jekyll, and indicated by Lord Stowell, to wit, that the owner not being at the place where the contract was necessarily made, the master had a right to hypothecate the vessel for necessities, and that, therefore, there being no special contract, the law would imply a lien.

But whatever may have been the prevailing reason in England, the supreme court of the United States has, more than once, decided that, for repairs done, or supplies furnished a maritime vessel in a foreign port, the law will, if there be no special contract, imply a lien on the vessel: *The General Smith*, 4 Wheat. 438, and *The St. Jago de Cuba*, 9 Id. 409, and 5 Cond. 631. And, in this last case, the court explained "the home port" to mean, not necessarily the vessels chartered home, or the place of the owner's domicile, but any port or place where the owner should happen to be with his vessel. For the court said: "It is not in the power of any one but the ship master, not the owner himself, to give these implied liens on the vessel; the vessel must go on; this is the consideration that controls every other; for these purposes the law maritime attaches the power of pledging or subjecting the vessel to material-men, to the office of ship-master, and considers the owner as vesting him with those powers, by the mere act of constituting him ship-master. The necessities of commerce require that, when remote from the owner, he should be able to subject the owner's property to that liability, without which, it is reasonable to suppose, he will not be able to pursue his owner's interest. But when the owner is present, the reason ceases, and the contract is with the owner himself, on his ordinary responsibility, without a view to the vessel as a fund from which compensation is to be derived. From this view of the subject, this court will be best understood when it speaks of the home port of the vessel—an epithet which, it is very easy to perceive, has no necessary reference to state, or other limits."

In England, however, it appears, from the cases already herein cited, that, the owner living in England, his vessel should not be deemed to be in a foreign port, but as to the question of implied lien, should be considered as being in its home port when-

ever it was at any place within the jurisdiction of the common law courts of that island. And if this view can be reconciled with that given in the case of the *St. Jago de Cuba*, by our supreme national court, then, so far as these co-estates may be concerned, a vessel should be deemed to be in its home port whenever it is at any place within the state in which the owner resides. But, if there be any essential discrepancy in this particular between the opinion of our supreme court and that of the courts of England, yielding, as we would be inclined to do, to the authority of our own tribunal, we should hold any-place where the vessel and its owner are not together, to be a foreign part or port. It is not necessary to settle this point more definitely now; because it not only does not appear in this case where the owner of the *Lancaster* resided, or what place was the registry home of the vessel, but it does appear, or is strongly to be inferred, that, when the supplies were furnished by Lazet and Amelung, and by Tucker and Craig, the owner of the boat was in New Orleans commanding the boat; and, therefore, as those merchants made no special contract with him for a lien or other collateral security, the law presumes they trusted to his personal responsibility, and did not look to his boat as a security, unless the local law of Louisiana gave them a lien on it.

Though there has been no attempt in this case to prove that there was any local law giving any such lien, yet we know that, according to the Justinian code, it would have existed in favor of the creditors just mentioned; and we know, too, that the civil law of France, as it existed antecedently to the cession of Louisiana to our national government, would have entitled them to a lien for one year, even though there may have been an intermediate sale of the boat by the owner to a stranger; and knowing, as we also do, that the civil law of France was the basis of the local law of Louisiana, we can not know judicially, whatever we may believe personally, that, in respect to this question of implied lien and priority, the law of France was ever so modified in Louisiana as not to entitle Lazet and Amelung, and Tucker and Craig, to implied liens on the *Lancaster*, for the supplies furnished for her by them, even to the owner at New Orleans. And, therefore, we do not feel authorized to decide that the district court had not what it claimed and exercised, jurisdiction *in rem*, as well as *in personam*. Having jurisdiction over the parties, upon maritime contracts, for supplies at New Orleans, we should presume that the whole decree was right, and that the court had power to render it. But if the decree *in rem* be erroneous, that circumstance alone could not affect this case.

But moreover, were it conceded that there was no lien in consequence of any local law, still, as the district court had maritime jurisdiction *in personam*, at least, and the parties over whom it had cognizance, and who were before it, agreed on its record that it might forthwith sell the boat, it thereby acquired authority to do so, and the sale, pursuant to that agreement, was therefore binding on all the parties to the agreement, of whom the owner was, of course, one, and who has, also, since ratified the sale.

Wherefore, as the only responsibility of the appellants, Reed and Case, is that which is supposed to have resulted from the assumed liability of the Lancaster, since the sale of it to Henshaw, the decree as to them must be reversed, as no objection has been made to the prosecution of an appeal by them alone; and as the decree *in personam* is against them and Hinkle jointly, the entire decree must be reversed, even though Hinkle has not complained. But, as he has not sought a reversal, we shall not inquire whether there is any error to his prejudice.

Decree reversed, and cause remanded, with instructions to dismiss the bill as to the appellants, Reed and Case.

The jurisdiction of the admiralty courts of the United States extends over a case arising at the port of Philadelphia on the Delaware river: *Montgomery v. Henry*, 1 Am. Dec. 223; and generally over all places where the tide ebbs and flows: *Thoms v. Southard*, 26 Id. 467.

THE TERRITORIAL LIMIT OF THE JURISDICTION OF THE COURTS OF ADMIRALTY has been a subject of great contention both in England and in these United States, especially concerning places claimed to exist within the body of a county. In England, the jurisdiction of these courts was limited by the statutes 13 Rich. II.; c. 5; 15 Id., c. 3, and 2 Hen. IV. After the passage of these statutes, the courts of admiralty had no jurisdiction except of cases arising on the high seas which washed the open coast; and a branch "of the sea within the *fauces terræ*, where a man may reasonably discern from shore to shore, is or may be within the body of a county. * * * So sternly has the admiralty been excluded from what we believe to be its ancient jurisdiction in England, that a prohibition within a few years has been issued in case of collision happening between the Isle of Wight and the Hampshire coast; and a case of collision in the river Humber, twenty miles from the main sea, but within the flux and reflux of the tide, has been held not to be within the admiralty jurisdiction. *The Public Opinion*, 2 Hagg 298:" *Waring v. Clarke*, 5 How. (U. S.) 433.

One of the earliest American cases determined by the court of last resort was that of *Waring and others, owners of the steamboat De Soto, against Clarke, master of the steamboat Lunda*, decided in 1846 and reported in 5 How. (U. S.) 441. The plaintiffs filed their libel *in rem* to recover for injuries suffered from a collision with the *Lunda*, in the Mississippi river about ninety-five miles above New Orleans, and within the ebb and flow of the tide. It was contended, on appeal, that the admiralty was without jurisdiction be-

cause the locality was *infra corpus comitatus*. The opinion of the court was delivered by Judge Wayne. He proceeded to state that, at the adoption of our national constitution, the English courts of admiralty exercised jurisdiction "in cases of collision and injuries to property or persons on the high seas," and to refer to the English statutes limiting the admiralty jurisdiction. But he insisted that the limitations of these statutes were not imposed upon the admiralty courts of the United States. He referred to the admiralty jurisdiction as exercised in the colonies, and showed that the grants thereof generally included "power and authority in and throughout our province of ——— aforementioned, etc., and maritime ports whatsoever of the same and thereto adjacent, and also throughout all and every of the sea-shores, public streams, ports, fresh-water rivers, creeks, and arms, as well of the sea as of the rivers and coasts whatsoever in our said province;" and that the proceedings of the continental congress, and the debates of the constitutional convention showed that the admiralty jurisdiction was never intended to be any less ample than that exercised in the colonies.

The judge further held that we never could have intended to adopt as part of our national constitution the English statutes and their limitations, thus taking from our courts the "interpretation of what were cases of admiralty and maritime jurisdiction," and denying our congress the right to legislate thereon, unless after some amendment to our constitution. He therefore concluded "that the grant of admiralty power to the courts of the United States was not intended to be limited or interpreted by what were cases of admiralty jurisdiction in England when the constitution was adopted;" and further, "that the admiralty jurisdiction of the courts of the United States extends to tide waters, as far as the tide flows, though that may be *infra corpus comitatus*; that the case before us did happen where the tide ebbed and flowed *infra corpus comitatus*, and that the court has jurisdiction to decree upon the claim of the libellant for damages." Judge Catron concurred specially, while Justices Daniel, Green, and Woodbury dissented, the latter in a voluminous opinion. While the judges were by no means unanimous in this case, subsequent decisions show unmistakably that there is now no room to doubt that cases of admiralty and maritime jurisdiction extend to all points where the tide ebbs and flows: *N. J. S. N. Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *Transportation Company v. Fitzhugh*, 1 Black, 574.

Nor does the ebb and flow of the tide limit the jurisdiction of the American courts of admiralty. The case of the *Propeller Genesee Chief v. Fitzhugh*, 12 How. (U. S.) 443, arose out of a collision on Lake Ontario. There were indeed many reasons for extending the admiralty jurisdiction to the great lakes. "These lakes," said the court, "are in truth inland seas. Different states border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different states and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them and prizes been made, and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the admiralty court to administer international law, and if the one can not be established, neither can the other." In the same case the court observed that "the only objection made to this jurisdiction is that there is no tide in the lakes or the waters connecting them; and it is said that the admiralty and maritime jurisdiction, as known and understood in England and this country at the time the constitution was adopted, was confined to the ebb and flow of the tide. Now there is certainly nothing in the ebb and

flow of the tide that makes the water peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it."

The court proceeded to state that in England there was no public navigable river beyond the ebb and flow of the tide; and, therefore, that the terms "tide water" and "navigable water" came in that country to be regarded as synonymous; that in the old thirteen colonies the greater portion of the navigable waters were also tide waters; but that the invention of the steam-engine had made it possible to propel steamboats against the current, hundreds of miles into the interior of the country, to points far remote from the ebb and flow of the tide, and had thus made the tide water measure of navigability notoriously and obviously inadequate and incorrect. That while the court, under the influences of precedent, and without sufficient consideration of the gravity of the subject, the novelty of our situation, and the demands of our growing commerce, had, in the case of *The Thomas Jefferson*, 10 Wheat. 428, and of the *Steamboat Orleans v. Phœbus*, 11 Pet. 175, followed the English definitions and rules, it now felt bound to overrule these decisions. "It is evident that a definition that would, at this day, limit public rivers in this country to tide-water rivers, is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers, in which there is no tide. And certainly there can be no reason for admiralty power over a public tide water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the constitution of the United States:" *Propeller Genesee Chief v. Fitzhugh*, 12 How. (U. S.) 457.

In the case of *Jackson et al. v. James*, 20 How. (U. S.) 296, the supreme court again declared, though not unanimously, that the jurisdiction of the admiralty did not depend on the flux and reflux of the tides, but embraced the case of a collision occurring in the Alabama river, far above tide water. Soon afterwards, the Yazoo river, although wholly within the state of Mississippi, was decided to be within the admiralty jurisdiction, notwithstanding the waters therein were sometimes too low for safe navigation. "The vast extent of our fertile country, its increasing commerce, its inland seas, bays, and rivers, open to us a commercial prosperity in the future which no nation ever enjoyed. Our contracted views of the English admiralty, which was limited by the ebb and flow of the tide, were discarded, and the more liberal principles of the civil law, equally embraced by the constitution, were adopted. This law is commercial in its character, and applies to all navigable waters, except to commerce exclusively within a state. Many of our leading rivers are sometimes unnavigable; but this can not affect their navigability at other times:" *Nelson v. Leland*, 22 Id. 56. It is now well established that the ebbing and flowing of the tide is not essential to the admiralty jurisdiction: *The Eagle*, 8 Wall. 15; *Insurance Company v. Dunham*, 11 Id. 1; *The Hine v. Trevor*, 4 Id. 555.

In the case of collision between two vessels, it is not essential to the jurisdiction of the court of admiralty that either should, at the time, be engaged in foreign commerce or in commerce between the states: *Transportation Company v. Fitzhugh*, 1 Black, 574.

By section 563, subdivision 8, the district courts of the United States are given jurisdiction "of all civil causes of admiralty and maritime jurisdiction; saving to all suitors in all cases the right of a common law remedy, where the common law is competent to give it." Under this section it is manifest that in certain cases wherein a common law remedy exists and is adequate, the admiralty courts of the United States and the local state tribunals may possess a concurrent jurisdiction. But this is not true beyond these cases. In many of the states, statutes were enacted authorizing proceedings *in rem* against vessels under which they were liable to be seized and impleaded as defendants, and ordered to be sold in satisfaction of some claim made against them. It was long before any of these enactments were assailed; but, when assailed, they were found utterly insupportable. The jurisdiction of the courts of the United States over such proceedings is exclusive: *The Moses Taylor*, 4 Wall. 411; *The Hine v. Trevor*, Id. 555; *The Belfast*, 7 Id. 624; *Steamboat Co. v. Chase*, 16 Id. 529. They are not proceedings at common law, for there the process and judgment is *in personam*.

"Principal subjects of admiralty jurisdiction are maritime contracts and maritime torts, including captures *jure belli*, and seizures on water for municipal and revenue forfeitures.

"1. Contracts, claims, or services purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty.

"2. Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty courts. Jurisdiction in the former case depends upon the nature of the contract, but in the latter it depends entirely upon the locality. Mistakes need not be made if these rules are observed; but contracts to be performed on waters not navigable are not maritime, any more than those made to be performed on land. Nor are torts cognizable in the admiralty unless committed on waters within the admiralty and maritime jurisdiction, as defined by law:" *The Belfast*, 7 Wall. 637; *Philadelphia W. & B. R. R. Co. v. Philadelphia & H. De G. S. T. Co.*, 23 How. (U. S.) 209; *Morewood v. Enequist*, Id. 491.

A contract to build a ship is not a maritime contract. It is made on land, to be performed on land. The admiralty courts have no jurisdiction to enforce liens for labor done or materials furnished in such construction: *People's Ferry Co. v. Beers*, 20 How. (U. S.) 400; *Roach v. Chapman*, 22 Id. 129. "In general, contracts upon land, though to be executed on the sea, and contracts at sea, if to be executed on the land, are not cognizable in the English admiralty;" and this is generally true in this country: *Grant v. Poillon*, 28 Id. 168.

ALLISON v. TAYLOR AND WASHBURN.

[6 DANA, 87.]

A JUDGMENT AGAINST A LUNATIC on process served upon him alone, and not on his guardian, though erroneous, is not void.

Pirtle, for the appellant.

Owsley, for the appellees.

By Court, ROBERTSON, C. J. The only question presented in this case is, whether a judgment by default against a lunatic,

upon service of process on him alone, be void, because his committee was not a party. And it is our opinion that, though evidently erroneous, the judgment is not void.

Had the fact of lunacy appeared in the record of the judgment, a writ of error to this court would have insured the proper relief. But though the fact did not so appear, and is judicially known only from an admission in the record of this suit—brought to enforce (by eviction) a purchase of the lunatic's land, under an execution on the judgment against him—yet, upon a writ of error *coram nobis*, the judgment might have been set aside. There being, however, according to the authorities, ancient and modern, a parallelism, to a great extent, in the legal capacities of lunatics and infants, and this court having, and we think correctly, decided that a judgment against an infant, without defense or the intervention of a guardian *ad litem*, is not void, we would not, in the absence of any direct authority, feel authorized to decide that a judgment by default against a lunatic is void, merely because his committee was not a party, and no person was appointed to defend the suit. Moreover, this conclusion seems also to be established by the authority of adjudged cases: *Shelford on Lunacy*.

This is not a case, as we think, in which it should be decided that there was, in judgment of law or in fact, no notice whatever of the suit; and, therefore, the judgment should not be deemed void for want of any citation. Irreparable injustice can seldom, if ever, result from the recognition of such a doctrine; because official service on a lunatic will generally be indirect personal notice to his committee, keeper, or some other friend; and no judgment can be enforced against his estate, without the knowledge of some one whose relative position would prompt the requisite attention to the proper procedure for setting it aside if unjust. Therefore, where, as in this case, such a judgment is permitted to stand and be enforced without objection, the rational presumption is that it is right, and could not have been prevented by any defense that could have been made. We, therefore, perceive no solid ground for declaring it void; and we are also of the opinion that, the judgment not being void, the land of the lunatic was liable to sell under an execution upon it.

Wherefore, the judgment of the circuit court, which declared the judgment against the lunatic, Taylor, to be void, must be reversed, and the cause remanded for a new trial of the action of ejectment, founded on the title conveyed by the sheriff to the purchaser of the lunatic's land, under an execution issued on the judgment against him.

JUDGMENTS AGAINST LUNATICS are neither void nor voidable. They can not be reversed for error on account of defendant's lunacy. The proper remedy in favor of a lunatic is to apply to chancery to restrain proceedings, to compel plaintiff to go there for justice. In an action against a lunatic, judgment is properly entered against him and not against his guardian. Unless set aside in chancery, or by some other appropriate remedy, a judgment against a lunatic is of unquestionable validity: *Lamprey v. Nudd*, 9 Post. 299; *Wood v. Bayard*, 63 Pa. St. 320; *Foster v. Jones*, 23 Ga. 168; *Sacramento Savings Bank v. Spencer*, 53 Cal. 737; *Stigers v. Brent*, 50 Md. 214; 10 Cent. L. J. 473; *Johnson v. Pomeroy*, 31 Ohio St. 247. If an attempt were made to vacate or enjoin such judgment in chancery, doubtless the mere insanity of the judgment defendant would not be a guaranty of success. It would require the aid of other facts, from which the conclusion must follow that the judgment is inequitable and can not be executed without injustice.

SNEED'S HEIRS ET AL. *v.* ATHERTON.

[6 DATA, 276.]

CO-TENANT IN POSSESSION acquiring an adverse title can not assert it against his co-tenants, if they are willing to contribute ratably to the cost of his purchase.

PURCHASE MADE BY ONE NOT THEN A CO-TENANT, does not inure to the benefit of those with whom he afterwards becomes a co-tenant.

BILL in equity. The opinion states the case.

Morehead, Brown, and Allen, for the appellants.

Chapeze, for the appellee.

By Court, EWING, J. Two patents issued in 1815, to Rountree, Sneed, and Atherton—one for three hundred and fifty acres, the other for six hundred and fifty acres—founded on surveys made in January, 1815, in the name of John May's heirs, and assigned by them to the patentees, the second of February, 1815, which surveys were founded on a treasury warrant entry, in the name of John May, bearing date the eleventh of November, 1783. Rountree conveyed his interest in the land to Craddock and Allen, who, in conjunction with Rountree and Sneed's heirs, filed their bill against Atherton for partition, and an account of the profits.

Atherton filed his answer, resisting the prayer of the bill, upon the alleged ground that, as to a part of the land, he had been in possession for many years before the date of the two grants, claiming title under a claim in the name of Joseph Barnett, which was superior to the claim of the complainants; and as to the residue of the land embraced in the two patents.

he had purchased out adversary claims, of superior dignity, derived under Barnett's entry, and exhibits his titles. Upon the hearing, the circuit court dismissed the complainants' bill, and they have appealed to this court.

It appears that a survey was executed on the nineteenth of January, 1796, in the name of Joseph Barnett, for one thousand two hundred and thirty-one acres of land, founded on three several entries—one for one thousand acres, made in February, 1783, and two others in addition, and adjoining, made in a short time thereafter. That one Osborne purchased two hundred acres of the land embraced in Barnett's survey, and sold the same to Atherton, who took possession and settled on the same as early as 1796, and remained in possession ever since, claiming under Barnett's claim. That three hundred and fifty acres out of said survey were sold and conveyed by Barnett to one May and Hambleton, in 1795. That May and Hambleton sold to Percifull, in 1797, and Hambleton and the executor of May conveyed to him, in 1798. Percifull, in 1801, sold, and executed his bond, to one Lee, to convey to him one hundred acres, part of said three hundred and fifty acres. Lee assigned the bond to Bray, who sold to Atherton, in 1807. And said hundred acres has been continually possessed, ever since Percifull's purchase, by the several persons claiming under Barnett.

After the emanation of the two grants to Sneed, Atherton, and Rountree, Atherton brought an action of covenant against Percifull, on his bond, for failing to convey the one hundred acres, and recovered judgment in damages; whereupon, Percifull filed his bill against Atherton, setting up the superiority of his title to the land under the claim of Barnett, and upon the hearing a decree was rendered, ordering Atherton to surrender up the possession of the one hundred acres to Percifull, and release all claim to him for the same, and pay him rents. Afterward, the decree seems to have been settled between the parties, and a conveyance was made by Percifull to Atherton for the land, and he was never, in fact, evicted from the same. It seems from the record in that case, as well as from the proofs and exhibits in the record now before us, that Barnett died shortly after his survey was made, and that no grant had issued thereon, nor did any issue till 1817; and that, after its emanation, his heirs conveyed the three hundred and fifty acres to Percifull, which he had bought from Hambleton and May, who claimed the same under the deed of Barnett. That Percifull conveyed two hundred and fifty acres, the residue of the three hundred

and fifty acres, to Price, who conveyed the same to Carter, who conveyed to Hill, who sold and conveyed to Atherton, by deed bearing date the twenty-first of June, 1827, for the consideration of nine hundred dollars expressed in the deed. Barnett's heirs conveyed to Atherton all the residue of the one thousand two hundred and thirty-one acre survey, except the three hundred and fifty acres conveyed to Percifull by deed bearing date in April, 1826; so that Atherton now sets up claim to all the land embraced in Barnett's patent. It was agreed by the counsel below, that the whole record in the case of *Percifull v. Atherton* should be read as evidence in this case, except Atherton's evidences of title.

The two entries of Barnett—one for one thousand, the other for one hundred and thirty acres—are unquestionably good, and are, in equity, paramount or superior to the titles derived under the patents to Sneed, Rountree, and Atherton; and the decree of the circuit court, in the case of *Percifull v. Atherton*, was correct in so determining. The third entry referred to is not exhibited in the record. If those two entries be laid down properly, they will cover all the two hundred acres on which Atherton settled, and also the three hundred acres claimed by Percifull under Barnett's sale to May and Hambleton; and will also cover the whole three hundred and fifty acre tract patented to Sneed, etc., and probably a good portion of the six hundred and fifty acre tract patented to them. But the precise extent of the interference with the latter claim we are not able to determine, and it is not exhibited by any connected survey in the record.

It is a well-established principle of equity, repeatedly recognized by this court, that a tenant in common, joint tenant, or parcener, being in possession, will not be permitted to purchase up an adversary claim, and oppose it to the title of his co-tenant, or hold under it in opposition to their joint claim; but such purchase, if made, will inure in equity to the joint benefit of each, upon the equitable terms of an equal contribution by each in the costs of purchase. This principle grows out of the privity between them, and inculcates fidelity and good faith: *Venable v. Beauchamp*, 3 Dana, 324 [28 Am. Dec. 74]; 5 Johns. Ch. 407;¹ 4 Mon. 298; 2 Johns. Ch. 33, 34.² But this principle can only be made to apply to purchases made after the joint tenancy or relationship exists between them. Until then, it can not be construed to be a breach of fidelity or good faith to purchase, as the privity has not commenced.

1. *Van Borne v. Fonda*.

2. *Holdridge v. Gillespie*.

In relation, therefore, to the two hundred acres claimed and possessed by Atherton under Barnett's title, and the one hundred acres claimed and possessed under the same title through Percifull, he stands upon different ground from that occupied by him in relation to the residue of the land purchased. As to those two parcels, he can not be construed to have purchased with a view to the joint benefit of himself and co-tenants, or for the protection of his and their joint title. Nor can he be chargeable with an infraction of good faith, or a breach of fidelity, in the acquisition of those parcels, such as would impose upon him the equitable duty to yield up these purchases for the joint benefit of all, upon the terms of an equitable contribution; as the relationship of co-tenant did not rest upon him at that time. Unless, therefore, it can be inferred, from his acceptance of the joint patents with Sneed and Rountree, that he intended to abandon his prior claim, or merge it in the new title, he ought not to be required to do so. There is nothing in the record that will lead to the conclusion that he had any such intention. But the contrary, we think, may be reasonably inferred from the facts exhibited.

He was, and had been, for many years, in the occupancy of the land, and had made valuable improvements upon it. He held a claim upon Barnett's heirs and on Percifull, for a title. It was suddenly discovered that a patent had never issued to Barnett or his heirs. His home and fireside were endangered; and, as a means of securing them, and rendering assurance doubly sure, he might well agree to shelter them with an additional title, without abandoning the title under which he acquired and held the possession. It can not be presumed that he intended to surrender up any part of his possession, or improvements, to his co-tenants, or to endanger them by his union in the new titles, but rather that he intended to strengthen and secure them by holding on to both titles. If Barnett's title proved the best, he would be protected under it; and if it failed, and the title to Sneed, Rountree, and himself proved paramount and superior, he would, by means of the interest which he held in them, be able to secure his home and possession.

The case is different from the case of *Jones v. Jones*, in 1 Call, 403,¹ to which we have been referred by the counsel. There the father and two sons take out an inclusive joint patent founded upon their former claims, and were decided to be joint tenants. But the decision goes upon the evidence of intention of the par-

1. 1 Call, 458.

ties to become so, deducible from the facts of the case. Here the titles are independent and distinct, and deducible from different sources, and without grounds for presuming an intention to become joint tenants of both claims. Besides, as to the one hundred acres, after a tedious lawsuit, and vigorous defense on the part of Atherton, a decree was rendered against him for it, and he was ordered to release, and, after he could no longer defend his possession successfully, he purchased out the claim. And it has been repeatedly determined by this court that, in the case of a tenant, between whom and his landlord an obligation of fidelity and good faith subsists, of equal force to that which subsists between co-tenants, after judgment of eviction, he need not wait to be turned out, but may purchase out, and take shelter under, an adversary claim. In like manner, after the decree against Atherton, it was competent for him to purchase out, and take shelter under, the adversary claim.

It matters not whether his co-tenants were, or were not, parties to the suit. If his possession was theirs also, it was their duty to defend it; and when they failed to do so, and it was lost, after a faithful defense on his part, he had a right to secure himself by purchasing, and taking shelter under, the opposing claim. As, therefore, Barnett's claim, at least to the extent of the three hundred acres, is the best, and as Sneed and Rountree have no joint interest in it, and as none can be implied in their favor, they, or Allen and Rountree, have no right to a partition in that part of the land.

But, in relation to the residue of the land embraced in their joint patents, a different principle applies. Atherton, after the privity of joint tenancy had commenced, and while it was subsisting, purchased up the adversary claims. His purchases will inure to the benefit of himself and his co-tenants, upon the terms of a ratable contribution to him, by them, for all sums fairly and in good faith expended in their acquisition, and in endeavoring to give security to his or their joint title—that is, that Sneed and Rountree each, or those claiming under either of them, shall contribute and pay to Atherton one third of the amount expended by him in acquiring or extinguishing Barnett's claim, or any other outstanding incumbrance, so far as the same conflicts with their joint patents, excluding the three hundred acres secured to him in the foregoing part of this opinion; for which, if he paid anything, he is entitled to no contribution.

The partition should be so made, if it can be done with equitable propriety, as to allot to Atherton that portion of land which

he has improved, excluding, in the computation, the additional value given to it by the improvement. If this can not be done, then he should be paid for the ameliorations of the land which may fall to them. And, if he has had the use of the land which may be allotted to them, and the profits shall equal the interest upon the proportion of the amount which they may be found indebted to him, they shall not pay interest, but the rents and interest should be set off against each other, as equivalents. But if the rents upon the part allotted to them shall not equal the interest, then they shall pay the excess of interest, and if there be no rents on that part, they shall pay the whole interest. It is difficult to give more specific directions, as the improvements are not laid down, or other facts exhibited which will enable us to do so, without danger of doing injustice to the parties. Suffice it to say that, upon an exhibition of all of the facts as to the amounts expended in the acquisition of any of the adversary titles, or in the fair endeavor to do so, as well as to the improvements, rents, and interest, equal justice shall be done as near as may be, according to the principles now settled.

We have not thought it necessary to say anything about the authentication of the deed of Barnett's heirs, or the proof of their heirship, as, if there be any difficulty upon that score, it would be proper for the court to give time to prove its due execution, or other facts sustaining its authenticity. The conveyance by Rountree to Atherton, and reconveyance by the latter to the former, can be regarded by this court as having no other effect than to reinvest Rountree with the title which he before held.

It is, therefore, the opinion of the court that the decree of the circuit court be reversed, and cause remanded, that a commissioner or commissioners may be appointed to hear proof, and ascertain and settle the amounts paid out, and other facts essential to a final disposition of the case, and that a decree be rendered, not inconsistent with the principles in this opinion settled; and the appellants are entitled to their costs in this court.

PURCHASE OF ADVERSE TITLE BY A CO-TENANT.—This subject is considered, and the authorities in this series and elsewhere referred to, in the note to *Venable v. Beauchamp*, 28 Am. Dec. 74, 83.

BANK OF KENTUCKY *v.* HANCOCK'S ADM'R.

[6 DANA, 284.]

INJUNCTION AGAINST ENFORCING THE MANDATE OF THE COURT OF APPEALS
may be granted by the circuit court, if such mandate be obtained surreptitiously or by surprise, or contrary to contract.

BILL in equity. The opinion states the case.

Owsley, for the plaintiff.

No appearance for the defendant.

By Court, ROBERTSON, C. J. This court having, for insufficiency of proof to sustain his equity, reversed a decree which Hancock had obtained for perpetuating a partial injunction to a judgment against him, in favor of the bank of Kentucky—on the return of the case to the circuit court, he filed a supplemental bill for suspending the mandate of this court directing a dissolution of his injunction, and for upholding the decree, on the ground that the attorney for the bank, being convinced, by a personal knowledge of the facts, that he was entitled to relief to that extent, and would be able to establish his equity by proof, consented to the decree, without further evidence, and wrote it himself; and that, therefore, the bank ought not to be permitted to enforce the mandate of this court, improperly obtained, by unjustly availing itself of the defectiveness of the proof in the record, and of the absence of any notice in it of the fact that the decree had been rendered by consent. The bank required proof of those allegations in the bill, and denied the authority of its attorney to bind it by any such consent as that alleged.

The allegations respecting the manner of rendering the decree were proved; and one witness deposed to facts conducing to prove the equity asserted in the original bill—that is, that the consideration of the note, on which the judgment for the nominal amount of it in money had been obtained, was a loan by the bank to Hancock, of notes on the bank of the Commonwealth, at their nominal value, though, at the time of the loan, in 1822, they were greatly depreciated. A deposition of the same witness had been filed in the case prior to the date of the decree which this court reversed, because his testimony did not show satisfactorily that the notes were loaned at their nominal value. No other testimony is exhibited in the record.

The circuit court having given the relief sought by the supplemental bill, this writ of error for reversing that decree pre-

sents two questions: 1. Was the defendant in error entitled to any relief? and 2. Was he entitled to that which was decreed to him?

1. Not doubting that a party who obtains a mandate from this court surreptitiously, or by surprise, or contrary to contract, may be enjoined from enforcing it whenever a judgment or decree of an inferior court might be enjoined on the same grounds, we are of the opinion that the defendant in error was entitled to relief upon the facts proved in this case. The testimony of the only witness as to the consideration of the note to the bank—now specific on an important point, respecting which it was in the first instance indefinite, and fortified, as it now is, by the supplemental proof that, about the date of that note, other notes, negotiated by the same bank, were generally discounted in Commonwealth's paper at its nominal value, and that the attorney for the bank consented to the first decree, and fixed the extent of relief upon his own knowledge of those facts—should, in our opinion, be deemed sufficient to sustain the allegations of the bill against an answer not expressly denying them on the personal knowledge of the respondents, nor containing even an intimation as to the kind or value of the currency in which the note was discounted. And the facts now shown are also sufficient, as we are strongly inclined to think, to authorize the inference that, had not the attorney for the bank, in order to prevent delay, consented to the relief sought by the original bill, such proofs would have been taken as would have prevented a reversal of it by this court; and, upon that hypothesis, we doubt not the authority of the attorney to act as he did.

The counsel for the bank, however, argued that, as the note discounted by the bank was in the form prescribed by the act of 1820, the consideration can not be inquired into; because the same act declares that "the consideration (of such a note), when discounted by the bank, shall not, by the drawers, or either of them, be questioned in any suit brought upon the same to coerce the payment thereof from the whole or either of the obligors."

It may be difficult to determine the precise object and effect of that anomalous enactment. But we can not believe that the legislature intended that, whatever the consideration of a note discounted by the bank might happen to have been, or when there had, in fact, been no consideration, or an illegal or insufficient one, there should not, in any way, be any judicial inquiry respecting it. We incline to think that, as the bank of Kentucky had, with legislative sanction, suspended specie payments,

whereby its notes had become somewhat depreciated, and as the bank of the Commonwealth had been chartered only a few days before the date of this enactment of 1820, the legislature intended that, when the bank of Kentucky should thereafter loan its own notes, or those of the bank of the Commonwealth, it should take a note, in the prescribed form, for the nominal amount in money; and that, therefore, as a suit upon the note could only be brought according to the form and legal effect of it, no plea should, in any such suit, be admitted for impeaching the consideration, on the ground that the action was ostensibly for the nominal amount in money, when the actual value of the loan had been of less value than such a sum in specie. And moreover, that, as such a discounted note was made by statute to operate as a foreign bill of exchange, the consideration should be as unimpeachable as that of an actual and formal bill of exchange.

But it was supposed and intended, of course, as we presume, that the bank should always accept, in payment of every such note, its own notes at their nominal value, or notes of the bank of the Commonwealth, at the same rate, or the value of them in specie, if such notes had been loaned, and it would not take them again as loaned, by denomination. And that if, after judgment on such discounted note, the bank should unjustly attempt to enforce it for specie, equity might give relief by preventing a perversion of the letter of the law to purposes not contemplated by the legislature, or by the parties.

In this case, the bank has not denied, in its answer, that it intended to enforce its judgment in specie; and, therefore, it might be enjoined from collecting more than the specie value of the notes loaned. And if, as we presume is the fact, a credit for about seventy dollars, admitted to be just, was included in the decree for perpetuating the injunction, the amount for which it was perpetuated was not too large.

Wherefore, the decree of the circuit court is affirmed.

CHAMBERS v. PLEAK.

[6 DANA, 426.]

TENANTS AND QUASI TENANTS CAN NOT LEGALLY ATTORN to a stranger, take shelter under an adverse claim, nor controvert their landlord's title.

AFTER JUDGMENT OF COURT AGAINST THE LANDLORD'S TITLE, the tenant may purchase or take shelter under the adverse title, but he probably can not do so while an injunction against such judgment is in force.

AFTER THE DEMISE IN EJECTMENT HAS EXPIRED, the judgment is inoperative; possession taken under it is a trespass; the tenant in possession is in no danger from it, and is therefore not justifiable in purchasing or taking shelter under the title on which it was based.

STATUTE OF LIMITATIONS CONTINUES TO RUN in favor of a party, although his tenant in possession acquires, or attempts to take shelter under, the adverse title.

TENANT OR QUASI TENANT MAY OUST HIS LANDLORD and hold adversely to him, and after notice of such adverse holding the landlord's title may become barred by prescription.

EJECTMENT. The opinion states the case.

Chambers and French, for the plaintiffs.

Owsley, Hanson, and Apperson, for the defendant.

By Court, EWING, J. This is an action of ejectment brought by the Chambers against Pleak, and verdict and judgment for Pleak, from which the plaintiffs have brought the case to this court. Errors are assigned, questioning the opinions of the circuit court in the instructions given to the jury at the instance of the defendant, and in refusing the instructions asked by the plaintiffs.

Some of the matters involved in this controversy have been heretofore twice examined by this court: first, in the case of *Gore v. Stevens*, 1 Dana, 201 [25 Am. Dec. 141]; secondly, in the case of *Pleak v. Chambers*, decided at the last spring term, 5 Id. 60. But there was a material difference in the proof in each case. Indeed, there is a censurable carelessness, or unskillfulness, in the preparation of this, as well as the last mentioned case, which renders it exceedingly difficult for this court to understand the record. A connected plat is made out; but the boundaries of the different tenements, or of the adversary claims, are not laid down, nor the places of the different settlements, under the claim of John Gore. Depositions are taken, in which the witnesses are not made to refer to objects exhibited on the connected plat, but to speak of, and attempt to illustrate, their ideas about places, by a reference to relative objects on the ground which are unknown to this court, and are not exhibited upon the connected plat. Good causes are often lost by culpable negligence in their preparation.

From what can be collected from the record, it seems that a patent issued to John Gore for one thousand acres of land, on the sixteenth of March, 1786. That one issued to Peter Warner, on the second day of December, 1784, for five hundred acres, covering a part of the same land. That both patents cover the

land in contest. That John Gore, junior, son of John the elder, under and by virtue of a power of attorney from his father, entered upon the one thousand acres, taking possession of the whole, in 1794, and remained on the same. That he made leases of several parcels to different tenants, and laid off two hundred acres, and put Ben. Gore, his brother, in possession of it: all as agent of his father, and under his titles.

Warner, on his elder patent, brought an action of ejectment against John Gore, jun., Ben. Gore, and the other tenants, and recovered a judgment in 1804. The demise in the declaration was laid at ten years, and expired in September, 1813. John Gore, sen., filed a bill, and obtained an injunction against the judgment, in which he set up a superior equity under his claim. The bill was depending until 1818, when it was dismissed. Of course, no writ of possession was ever sued out on the judgment, until after the expiration of the demise in the declaration.

Reynolds, who married a daughter of John Gore, sen., removed to the country, as near as can be collected upon the testimony, in 1811, '12, or '13, and was settled on the land by John Gore, jun., at the improvement, it is believed, occupied by himself, when the judgment of Warner was recovered, claiming as son-in-law, and to hold under John Gore, sen., in right of his wife; and a short time thereafter, John, the agent, caused one hundred and twenty acres to be laid off to him, embracing his improvement. Reynolds, some short time afterward, sold twenty-five acres of his tenement to Glover, and put him in possession thereof, and afterward sold to him twenty-five acres more, and put him in possession. Glover and those claiming under him have remained in possession ever since.

Pleak, the defendant, claims under Glover's purchase. The precise time when Glover purchased, and was placed in possession of, the first twenty-five acres, does not appear. But it is probable, from the proof, that it was not earlier than 1814. Deeds were not made to him until 1816, for the first twenty-five acres, and 1820, for the second.

John Gore, sen., died in 1816, leaving a will, by which he directed said tract to be divided among his children, in pursuance to which, by a decree of the court, in 1834, a division was directed, and deeds of partition executed in June, 1835, by which the land in part covered by Glover's purchase was assigned to Mary Chambers, a daughter of one of the plaintiffs, under whom the other plaintiffs claim. There is testimony in this record

tending to show that Ben. Gore contracted for the purchase of Warner's title, before the expiration of the demise in the declaration, though he did not take a deed until after. It seems, also, that he sold to Reynolds so much of Warner's claim as was embraced in the one hundred and twenty acres laid off to him by John Gore, jun. But this purchase by Reynolds was not made until November, 1813, about two months after the expiration of the demise in Warner's declaration.

From these facts, it is clear that John and Ben. Gore, and Reynolds, all entered as tenants, or *quasi* tenants, under the title of John Gore, sen. This being their attitude, the following principles may be laid down, as settled by the former decisions of this court: That as tenants, or *quasi* tenants, they could not legally attorn to a stranger, or take shelter under an adversary claim, or purchase in, or set up the same, in opposition to their landlord, or controvert his title, or set up an elder outstanding claim against it. And any person entering under them, or either of them, or deriving title from them, will stand in no better condition than they: 1 Stat. L. 444; *Phillips v. Rothwell*, 4 Bibb, 34; *Swan v. Wilson*,¹ 1 Marsh. 99; *Morgan v. Ballard*, Id. 558; *Hamel v. Lawrence*, Id. 330; *Turley v. Rogers*, Id. 245; *Foster v. Morris*, 3 Id. 611 [13 Am. Dec. 205]; *Conley's Heirs v. Chiles*,² and other cases, *sparsim*.

But so soon as it was ascertained, by the judgment of the court, that their landlord's title was not sufficient for their protection and security, it was competent for them to purchase in, or take shelter under, the adverse claim of Warner, without waiting for the consent of their landlord, or for a formal eviction: *Fowler v. Cravens*, 3 J. J. Marsh. 429 [20 Am. Dec. 153]; *Lunsford v. Turner*, 5 Id. 105 [20 Am. Dec. 248]; *Foster v. Morris*, 3 Id. 611 [13 Am. Dec. 205]; Litt. Sel. Cas. 423;³ *Swann v. Wilson*, 1 Marsh. 99. But, after the judgment was enjoined, it was certainly questionable whether they could, consistently with their fidelity to their landlord, have purchased in Warner's claim, or taken shelter under it, while the injunction was pending. During that period, their possessions were certainly not endangered from the coercive process of the court, at least. But it is deemed unnecessary, in this case, to decide this point.

But as, in the action of ejectment, possession for the term only laid in the demise is recovered, after the expiration of the demise the judgment for the possession is dead, and can no

1. *Swann v. Wilson*, 1 A. K. Marsh. 99.

2. *Chiles v. Conley's Heirs*, 2 Dana, 21.

3. *Chiles v. Bridges' Heirs*.

longer be enforced by process, or revived by *scire facias*, for there is nothing to enforce or revive; and possession taken under such a judgment would be a trespass, as without color of authority: *Smith v. Hornback*, 4 Litt. 232 [14 Am. Dec. 122]; *Smith v. Hornback*, 3 Marsh. 399;¹ 2 Bibb, 149.² Nor after the demise has expired can any execution be issued for the possession, though it has been suspended by injunction (the last case above); nor can the demise be enlarged after judgment, though stayed by injunction, as was settled by this court in the case of *Owings v. Marshall*, 3 Id. 27. But a chancellor will dismiss the bill of a defendant in ejectment, who is seeking equitable relief, upon motion, unless he will consent to enlarge the demise that is about to expire; but will not sustain a bill to enlarge it, though process has been suspended by injunction, until the demise has expired, though the lessor is barred in the mean time by the statute of limitations, as was determined in the case of *Bowman v. Violet*, 4 Mon. 355.

As the possessions of the tenants were no longer endangered by the judgment after the demise had expired, they were no longer justifiable in taking shelter under it, or in purchasing in the adverse claim, as was determined by this court in the case of *Pleak v. Chambers*, decided at the last spring term, 5 Dana, 60. But though it is admitted to be established now, by the proof, that Ben. Gore contracted for the purchase of Warner's claim before the demise expired, yet his purchase could only be construed to inure to the protection of his own tenement, which was distinct from the tenement of Reynolds which is now in contest. His rights, or the rights or duties of Reynolds, as to the tenement of the latter, were in no other respect changed by his purchase than to place Ben. Gore in the place of Warner, with all the rights to enforce the judgment of Warner against the other tenements, including Reynolds', which Warner possessed, and no more.

Therefore, though he purchased Warner's claim before the demise expired, if Reynolds did not purchase the part conflicting with his tenement from him or from Warner until after the demise expired, the necessity for the purchase no longer existed; nor could he say that it was made by the "consent of his landlord," or "in pursuance to a judgment," within the spirit or letter of the statute. His purchase was, therefore, without necessity, and repugnant to the obligations due to his landlord, and could not exonerate him, or his tenement, from the relation

1. 3 Marsh. 392.2. *Rice v. Lowan*.

which he and it bore to him And Glover, who came in under Reynolds, stood in the same condition, according to the principles above settled.

As the possession of the tenant, or of him claiming under the tenant, is the possession of the landlord, and as the acquisition of Warner's claim by the tenant was against law and void, it would seem to follow that the statute of limitations would still run on against it, and in favor of the claim of Gore, unchecked by the illegal acquisition of the adverse claim. This principle was settled in the case of *Myers etc. v. Buford*, 7 J. J. Marsh. 250, and recognized in the case of *Pleak v. Chambers*, above cited. But while it is admitted that the statute of limitation may still run on against the adverse claim, as a tenant, or *quasi* tenant, may oust and expel his landlord, and hold adverse to him, especially after the expiration of his lease, when it is for a limited time, such expulsion may take place, as well when he attempts to take shelter under an adverse claim as when he does not. His attempt to shelter himself under the adversary claim can not convert his adverse holding into a friendly possession, under his landlord, or change the character of his holding. And if, after the expiration of his lease, if his lease was for a specific term, he has held adversely for twenty years or more, it would seem that his landlord, or *quasi* landlord, or those claiming under him, would be barred of their right of entry, as well in the one case as in the other. Though he can not controvert the title of his landlord, he may show that it has expired: 2 Stark. Ev. 533; *Logan v. Steel's Heirs*, 7 Mon. 105. And so, if he entered as *quasi* tenant under an executory contract of purchase, or looking up to his landlord for a title, if he afterward ousted him, and held adversely to him for twenty or more years, by his acquiescence, without entry or claim on his part, such ouster, or adverse holding, would bar his right of entry: *Wilson v. Watkins*, 3 Pet. 43.¹

The statute was intended to quiet men's possessions, and to secure occupants in the quiet enjoyment of their homes, and should be so construed as to carry into effect this beneficent object of the legislature; nor does it matter whether the possession was acquired by right or wrong. If held adversely for twenty years, the right of entry is barred by the unequivocal provisions of the statute. It is true that the possession of the tenant is the possession of the landlord, as the possession of one joint tenant, or tenant in common, is the possession of his co-tenant,

1. *Wilson v. Watkins*.

and will be so deemed by the law until the contrary appears. But it is certainly competent, in either case, to show by proof an actual ouster and adverse holding; and if, from the time of such ouster and adverse holding, the landlord or co-tenant has with a full knowledge of the fact, laid by, and made no entry or effort to assert his claim, for the peace of society he ought to be barred, and the statute, as we conceive, will bar him.

But it should be remarked that ouster and adverse holding should be clearly made out by proof. The bare perception of the profits by one co-tenant may not avail, nor will the failure to pay rent only to the landlord suffice: 2 Cru. Dig. 318, etc.; vol. 1, 358, etc.; 2 Stark. Ev. 508, 509. Nor will the purchasing in or quieting an adverse outstanding claim by the tenant, or *quasi* tenant, he still looking up to the landlord for protection or for the completion or further completion of his title, avail. But, to be availing, it should be manifested by some open, notorious, public act of disclaimer, and holding over against the will, and in opposition to the title of the landlord, or by some forcible act of expulsion. If not manifested by some distinct and unequivocal act of this kind, his possession will be still deemed consistent with the possession of his landlord or co-tenant: *Id.* 512, 513. But it has been determined, in the case of *Doe v. Prosser*, Cowp. 217, and other cases collected in 1 Cru. Dig., from page 358 to 363, that possession for a long period, as thirty-six years or more, by one tenant in common or joint tenant, without any account or demand made, or claim set up, by his co-tenant, was a sufficient ground for the jury to presume an actual ouster. So, perhaps, a possession by a tenant after the expiration of his lease, for so long a period, without the payment of rent or other act recognizing the title of his landlord, might justify a jury to presume an actual ouster and adverse holding; but these cases go upon the principle that there was an actual ouster, the proof of which is lost by the lapse of time.

The opinions of the circuit court, as well in the instructions given at the instance of the defendant, as in withholding those asked for by the plaintiffs, being in direct conflict with some of the principles settled in the foregoing opinion, the judgment of the circuit court is reversed and cause remanded, that a new trial may be awarded; and the lessors of the plaintiff are entitled to their costs in this court.

Upon the point that the possession of a tenant or *quasi* tenant may become adverse upon his renouncing his landlord's title and refusing to hold otherwise than adversely to it, the principal case is in harmony with two others

in the same volume, viz.: *Ogden v. Walker's Heirs*, 6 Dana, 420, and *Sabastian v. Ford's Heirs*, Id. 437.

TENANT'S ADVERSE HOLDING AND THE ACQUISITION OF TITLE THEREBY are considered in the notes to *Duke v. Harper*, 27 Am. Dec. 462, and *Jackson v. Davis*, 15 Id. 451, 460, wherein the cases in this series are also referred to.

CURD ET AL. v. WALLACE ET AL.

[7 DANA, 190.]

THE DEDICATION OF A MEETING-HOUSE CREATES A CHARITABLE USE in favor of the beneficiaries, over which chancery will exercise jurisdiction to maintain the trust and to enjoin invasions thereof.

AN UNINCORPORATED RELIGIOUS SOCIETY COULD NOT SUE at common law in its own name, nor in the name of its agents or trustees in whom no right of property is vested; but by the statute of 1814, of this state, the trustees in whom title is vested may sue.

RELIGIOUS SOCIETIES MAY SUBMIT TO ARBITRATION, their respective claims to the use of a meeting-house.

AN AWARD IS NOT INVALID BECAUSE UNJUST or contrary to law.

AN AWARD UPON MATTERS NOT SUBMITTED is void.

AN AWARD WHICH IS REPUGNANT is invalid, as where arbitrators, authorized to determine whether B. has a right to the use of a meeting-house with A., first decide that neither party has any right to the property, and then that each party shall enjoy an equal use alternately.

SECEDED OR EXPELLED MEMBERS OF A CHURCH have, at common law, no interest in its property.

EFFECT OF STATUTE OF 1814 on rights of seceding church members considered.

BILL in equity. The opinion states the case.

Owsley, Morehead, and Brown, and M. C. Johnson, for the plaintiffs.

Crittenden and Cates, for the defendants.

By Court, ROBERTSON, C. J. The controversy in this case arises out of the conflicting claims of two separate societies of professing Christians to the use of a house of worship called the "Mount Vernon meeting-house," in Woodford county, erected in the year 1820, by the voluntary contributions of several persons then residing in that neighborhood, and dedicated by them to "the benefit of the Baptist society, but free for all gospel preachers (invited by any of the subscribers) on days not occupied by them." An acre of land, on which the house stands, was given by David Harris and Tavner Branham, each of whom contributed a half an acre, and executed his separate bond for a conveyance of the legal title to certain persons described as the trustees of the subscribers, to be held in trust for the purposes

of the dedication just recited. A Baptist church, shortly afterward organized in the neighborhood, and called "the church of Christ," took possession of the house, and have ever since used it as their house of public worship; and David Harris devised his half acre to that church, without any express qualification or trust.

In the year 1834, when the number of the church members had increased to about one hundred and forty, dissension sprang up among them, respecting some new and peculiar doctrines of "reformation." Doctor Fishback, the instituted pastor, had, with the concurrence of a majority of the members, adopted some modification of the ancient Baptist doctrines and discipline; and John Curd, and about twenty others of the members, having become "Campbellites," or "reformers," some of them were expelled, and the others seceded, organized a new society, and, having appointed Elder Palmer ("a reformer") their pastor, claimed, and attempted to enjoy, an equal use of the meeting-house. That claim being resisted, the old church appointed three of its members a committee for the purpose of conferring with a committee of the new church "respecting the occupancy of the house," and of referring to arbitrators the claim of the latter society, if the proposed negotiation should fail.

The committees of the two churches, not agreeing as to the right of occupancy, submitted to the arbitrament of Colonel William B. Blackburn and General James McConnell the claims of their respective churches, to be decided according to evidence and law; and the arbitrators, having decided that (neither of the churches being, in their opinion, a "Baptist society," according to the understanding of those who built and dedicated the house, at the time of the dedication) neither of them had any legal right to the occupancy of it, nevertheless awarded that, as each of them contained members who were original subscribers and heirs of such subscribers, each should occupy the house an equal portion of time, alternately.

The old church being dissatisfied with the award, and insisting that it was not within the scope of the submission which had been authorized by that church, the defendants in error, who had been regularly constituted its trustees, according to the statute of 1814, 2 Stat. L. 1347, filed a bill in chancery against the plaintiffs in error, as the trustees of the new church, for setting aside the award and enjoining the new church from disturbing the old church in the exclusive enjoyment of the meeting-house and appurtenant ground, claimed by them as their right. The

circuit court having, by its final decree, perpetually enjoined the new church, according to the prayer of the bill, that decree is now to be revised.

The record exhibits a large mass of polemical theology—probably abstract and unessential—which it is neither the province nor the inclination of this court to consider, further or otherwise than to determine, as we do determine: first, that a civil tribunal should not, upon the facts presented, decide that “the church of Christ,” as now organized, is not essentially a Baptist church or “Baptist society,” according to the substantial understanding and intention of those who appropriated the property in contest; and, secondly, that, for reasons which will presently appear, it is not necessary to decide whether the “reformers” are, in the like sense, Baptists, or essentially belong to “the Baptist society.” And, therefore, on such a subject, and in such a controversy as this especially, we shall not go out of our clearly defined judicial track to venture the expression of an unnecessary opinion. We shall, therefore, in this, as in every other case we have to decide, proceed at once to consider so much only of this controversy as involves the right of property or use, and depends on the laws of the land: which it is our province to administer impartially to all alike, according to our judicial opinion of their civil rights, as exhibited on the record before us.

Four principal questions are presented by the record: 1. Had the circuit court jurisdiction? 2. Can the suit be maintained as brought, in the names of the trustees? 3. Is the award valid and conclusive? and, 4. Was the decree authorized by the law and the facts of the case?

1. As the dedication created a charitable trust for the use of those who are the beneficiaries, and which is undoubtedly valid and enforceable in a court of equity, and as the object of the bill in this case is to maintain the trust, and especially to secure peace and enjoin multiplied invasions of alleged rights, we have no doubt that a suit in chancery is an appropriate and the only effectual remedy; and the fact that the contending parties are ecclesiastical bodies does not affect the question of civil right and remedy between them.

2. According to the common law, “the church of Christ,” not being a civil corporation, could not sue in its aggregate name, nor in the names of its agents or trustees, in whom, as in this case, the right of property is not, either by contract or devise, exclusively vested, unless the statute of 1814, *supra*, applies to the case, and authorizes a suit in the names of the defendants

in error, as the trustees appointed by the church since the dedication and the devise of the property. That enactment provides, among other things, in substance, that, whenever any organized society of Christians shall be entitled to the use of any lot of ground, not exceeding four acres, dedicated to the purpose of worship, burial, or poundage, and devised or conveyed to trustees, for the use of the church, the trustees who shall, from time to time, be afterward regularly appointed by the society, may, while trustees, hold the title in trust for its benefit, and may, in their own names as trustees, maintain any action which may become necessary "for the safe-keeping and preservation of said property."

The dedication of the property in this case should, in our opinion, be understood as having been intended for the use of "the Baptist society" or denomination which should be organized at Mount Vernon. And this interpretation is fortified by the fact that "the church of Christ," when organized in that neighborhood, took possession of the house and ground, has used and controlled them ever since, and was the devisee of the legal title to one moiety devised by Harris. If, then, the statute should be understood as applying to cases in which the equitable "title" only is vested in trustees, as well as to cases in which the legal title is so vested, we could not doubt that this suit may be maintained in the names of the defendants in error, who were the trustees of the church of Christ when the suit was instituted, and appear to have been appointed according to the statute of 1814. But even if the application of the statute should be restricted to cases in which the legal title, in a technical sense, shall be vested in trustees, we should be of the opinion that this suit may be maintained; because the legal title to a moiety is unquestionably in the defendants in error as trustees; and having thus acquired a right to sue, as they have sued, the entire rights of the parties are properly brought into litigation, and should be adjudged.

3. It does not appear that the right of "the church of Christ," or old church, to use the meeting-house and appurtenant ground was ever denied or called in question by the new church. The claim of the latter church to a participation in the use was the only matter of controversy, and was the only subject which the committee of the old church was authorized to submit to arbitration. If that committee intended to submit more, it transcended its authority, and the submission, so far as it was unauthorized, was void. Nevertheless, had the arbitrators de-

cided that the new church is entitled to an equal participation in the alternate use of the meeting-house, the award being so far within the authorized submission, would have been valid and conclusive; for, however unjust or palpably contrary to law such an award might have been, the parties, having constituted the arbitrators the final judges of the law of the case to that extent, and upon that matter, would have had no just ground for complaining of the mere erroneousness of the award.

But the arbitrators decided that neither party had a right to use the church. That decision, so far as it applied to the old church, was unauthorized, and therefore void. But, so far as it applied to the new church, it was within the scope of the authority possessed by the arbitrators. But this decision was altogether irreconcilable with the subsequent conclusion and award, that each party should enjoy alternately an equal use. And, as the arbitrators were required to decide according to law, when they had decided that neither party had any right, according to the law of the case, to use the house, they had no authority to award, as they did, that nevertheless each of them should use it equally and alternately. Such an award should be deemed (so far as the old church is prejudiced by it) void, for repugnance and illegality on its face. If it be valid to any extent, it is valid only so far as it decided that the new church had no right to the use of the house. But, as it is so incongruous and suicidal on its face, and as, moreover, the old church, in seeking equity, should claim it only on just and equal terms, and has not sought to enforce the award as a decision, in legal effect, against the new church, but has prayed that it may be set aside and altogether disregarded, as totally invalid—therefore, we are of opinion that the entire award should now be disregarded, and the rights of the parties adjusted precisely as they should have been had there been no submission to arbitration.

4. Understanding, as we do, that the dedication was intended for the benefit of "the Baptist society," through the instrumentality of a Baptist church, to be organized at Mount Vernon, which, whenever established, should enjoy the use and control of the appropriated house and ground, we are of the opinion that "the church of Christ," which had been so long permitted to use and control the house and ground, without complaint or question, so far as we know, from any quarter, has a right still to enjoy the use as beneficiaries on the trust estate. And without the statute of 1814, we should be of the opinion that the ex-

pelled and seceding members of that church, so long as they remain out of it, could not justly claim a right to any use of it or control over it, unless invited by a subscriber.

But the act of 1814 contains the following provisions:

" Provided, however, that if any schism or division shall take place in said congregation or church, from any other cause than the immorality of its members, nothing in this act shall be so construed as to authorize said trustees to prevent either of the parties so divided from using the house or houses of worship, for the purposes of devotion, a part of the time, proportioned to the number of each party:"

" Provided, that nothing in this act shall be construed to authorize the minority of any church having seceded from, or been expelled, or excommunicated from, the church or congregation, from interfering in any manner in their appointments for preaching or worship, with any appointment for similar purposes which may have been made by the body, or the major part, of such church or congregation."

These provisions are certainly anomalous and somewhat perplexing, but they must have some effect; and, as the property in this case was dedicated since the date of that enactment, the remedy of the defendants in error must, in some respect, be considered subject to the foregoing provisos. As the property was dedicated to "the Baptist society," an expelled or a seceding minority of "the church of Christ," as established, could not, upon common law principles, retain any usufructuary interest in the prescribed trust, if they ceased to be Baptists; because the donors restricted the trust to the use of Baptists. Was it the object of the first proviso of the act of 1814 to give and secure a right of use to such a seceding and transformed minority? We think not. There could have been no just motive for such an enactment. Nor can we believe that, if seceding or expelled members of a Christian church should renounce the Christian religion and become infidels or Mohammedans, the legislature intended to secure to them any use of the church property dedicated to the society of Christians they had deserted. In our opinion, the most consistent interpretation of the first and third provisos of the act of 1814 is, that the legislature did not intend to give authority to trustees of churches to employ the instrumentality of the civil power to prevent expelled or seceding minorities of their churches, unless expelled for immorality, from enjoying a proportionate use of the church property for the purposes of Christian worship; in other words, that

the legislature did not intend to interfere between the contending parties of a dismembered church, as long as each continued to profess the Christian religion, and neither had been convicted by the other of irreligion; but intended to leave such parties to ecclesiastical discipline and authority, to the protection of their own Christian armor, and to the guidance of their own Christian charity and prudence. According to its literal import, the first proviso does not either give any new right, or recognize any existing right in an expelled or seceding minority of a church. It only declares that the preceding authority given to trustees should not be so construed as to "authorize" them to prevent either of the parties from using the church property for public worship in proportion to their relative numbers; that is, that the act of 1814 should not, in that respect and to that extent, apply to such a case, so as to give any remedial power to trustees.

But if seceding members of a church should sue the church for the purpose of asserting any right which would not have existed independently of the provisos in the act of 1814, the law would not aid them; because those provisos do not give to them any right, but only withhold from the other party the aid of a civil remedy to coerce them. And this interpretation is most accordant, too, with the presumed objects of the provisos, and is rather corroborated by the third proviso, which declares that nothing in the first proviso shall be so construed as to authorize a seceding minority of a church to interfere with any appointment made by the majority: which we understand as meaning that the act of 1814 will not help such a minority, against the discretion of the majority, in fixing their own appointments for worship in their meeting-house, but leaves them as they would have stood had that statute never been enacted.

But as "the church of Christ," or old church, has appealed to a civil tribunal, under the act of 1814, the circuit court had no right to give relief beyond the measure prescribed by the first proviso of that statute, without which this suit could not be maintained in the names of the trustees. Nevertheless, the decree which we are revising enjoins the new church from ever using the Mount Vernon meeting-house, unless invited by a subscriber. Such an entire injunction was unauthorized by the act of 1814. And, therefore, in this respect, the decree is erroneous.

Wherefore, the decree is reversed, the award set aside, and the cause remanded, with instructions to the circuit court to decree that the plaintiffs in error, and the church which they rep-

resent, be enjoined from using, or attempting to use, the Mount Vernon meeting-house, and its appurtenances, otherwise, or oftener, than shall be consistent with the exclusive right of "the church of Christ," or old church, to use them, according to its own appointments, to be made in such a manner as to leave to the new church, in good faith, so much of reasonable time as shall correspond with the ratio of its number of constituent members (as composed, from time to time, of seceding members of the old church), to that of the elder and now major church; and that the said new church be also enjoined from disturbing the said "church of Christ," or old church, in the peaceful enjoyment of the exclusive use of the said meeting-house and its appurtenances, according to its own appointments, to be made as aforesaid.

This decree is as definite as the provisions of the statute of 1814, and the facts before us, will enable us to prescribe. If, in the application or interpretation of it, collision should hereafter occur, the chancellor below will have the authority upon proper suggestion, at any time, to enforce the observance, and prevent any improper abuse of the injunction.

MORRISON v. POYNTZ.

[7 DANA, 307.]

ONE SURETY IS NOT ENTITLED IN EQUITY TO CONTRIBUTION FROM ANOTHER, if, by ordinary diligence, he can obtain indemnity from their principal. A SURETY, BEFORE PAYMENT, may maintain a bill in equity against his co-sureties and their principal to compel the latter to pay, if able, or to require the sureties to contribute, when the principal is unable to make payment.

ASSUMPSIT BY ONE SURETY AGAINST ANOTHER does not lie where recovery can be had from the principal debtor, or out of property which such principal had placed in the hands of plaintiff for his indemnity.

APPLICATION TO A CO-SURETY FOR PAYMENT OR CONTRIBUTION is not indispensable to a recovery against him for his share of the moneys actually paid by his fellow-surety to discharge the debt of their principal.

ASSUMPSIT. The opinion states the case.

W. R. Beatty, for the plaintiff.

Mr. Hord, for the defendant.

By Court, ROBERTSON, C. J. This is an action of assumpsit, instituted by Nathaniel Poyntz against James N. Morrison, to recover one third of a debt or debts which Poyntz had paid as a

co-surety with Morrison and one Payne, for Robert I. Langhorne. The recovery was resisted on the ground that Langhorne had mortgaged to Poyntz and Payne property worth about thirty thousand dollars, for indemnifying them as co-sureties of Morrison, and for other liabilities, amounting altogether to rather more than thirty thousand dollars; and that Poyntz had neither proceeded to foreclose the mortgage, nor otherwise to dispose of the mortgaged property, nor proved in any way that Langhorne was, as to the sum claimed in this suit, either partially or totally insolvent. But the circuit judge, not considering that defense sufficient, gave instructions to the jury which eventuated in a verdict and judgment against Morrison for the amount sought to be recovered.

We can not concur with the circuit court. Assumpsit for money paid by a surety is a modern remedy, and, as between co-sureties, it seems to have been adopted on the ground that, as courts of equity had established an equitable right to contribution, the law should imply a promise by each to each to contribute, to their joint liability, their respective parts, whenever the pre-established principles of equity should require contribution.

It is well settled that, in equity, a surety who has paid the debt is not entitled to contribution from a co-surety, as long as he may be able, by ordinary diligence, to obtain restitution or indemnity from the principal debtor; and that, before any payment of the debt, any one of several sureties may maintain a bill against his co-sureties and their principal to compel the latter to pay it, if he be able, or the former to contribute to the payment of it, if he should be unable to pay it. And, as the principle on which courts of equity interfere in behalf of a surety, against his co-surety, is that of equalizing a common burden, not only does a payment by one of several sureties not entitle him to contribution from a co-surety, as long as he might obtain indemnity from their common principal, who is liable, in the first instance, for the whole debt, but, if there be more than two co-sureties, and any one of them be insolvent, as well as their principal, the burden will be distributed by a court of equity among the solvent sureties, just as it should have been had they alone been bound.

It has been said, however, that in an action of assumpsit, notwithstanding the insolvency of one of several co-sureties, one of them who had paid the joint debt can not recover of another, who is solvent, more than his aliquot part, apportioned accord-

ing to the number of sureties who were bound; because, as has been also said, the act of becoming co-sureties implies a mutual agreement that each will contribute such numerical ratio of the debt, in the event of the principal's failure: *Theobald's Principal and Surety*, 266; *Cowell v. Edwards*, 2 Bos. & Pul. 267, 268; *Browne v. Lee*, 6 Barn. & Cress. 689. And it is true that, in *Cowell v. Edwards*, *supra*, which was assumpsit by a surety against his co-surety, Lord Eldon, chief justice, said, that it was "perhaps then too late to hold that this action could not be maintained at law, though neither the insolvency of the principal nor of any of the co-sureties were proved;" and it seems that, in New Hampshire, that dictum has been recognized as the true doctrine of the law: *Odlin v. Greenleaf*, 3 N. H. 270.

But our predecessors expressly decided, in *Pearson & Co. v. Duckham*, 3 Litt. 385, that assumpsit could not be maintained by a surety against a co-surety, on account merely of a payment made by the plaintiff, unless their principal was unable to make restitution. Hence it appears that there may be some diversity of opinion as to the foundation and extent of the assumpsit implied by law, between co-sureties for the same debt or duty.

It seems to us, however, that the only assumpsit resulting by implication from a mere payment by one of several co-sureties, is that the principal, so far as he may be able, shall make restitution first, and that, so far only as he may be unable, the co-sureties shall make contribution. So far as the principal may be able to refund it, money paid by one of his sureties was, in judgment of law, paid to his use, and not to the use of his other sureties; and to that extent, therefore, the law should not imply any assumpsit by those other sureties, especially as they were not equitably responsible for contribution, and the action of assumpsit against a co-surety for money paid to his use, is founded on the principle of contribution and partial indemnity, first recognized and enforced in courts of equity. We shall, therefore, adhere to the doctrine of our own court, as established in *Pearson & Co. v. Duckham*, *supra*, because it is more authoritative, as well as more reasonable and consistent, than any opposing post-revolutionary dictum or decision in England.

Starkie, in his third volume on evidence, page 1384, says that, "in an action by a surety against a co-surety, the plaintiff must prove his application to the defendant to pay his share, and the payment by himself." But application to a co-surety, to make contribution before payment, could certainly not be necessary to the maintenance of an action founded on an assumpsit

resulting by implication from the simple fact of payment by another surety. If such an application can be necessary in any case, it must be so only on the hypothesis that the act of binding themselves as co-sureties implied a promise by each to each to contribute his aliquot part to the payment of the common debt, whenever any one of them should be called on to pay it, and should call on the others to help him to meet the demand. And if there be such an implied promise, coeval with the principal obligation, then, as there might be a breach of it, even when the principal debtor is solvent, proof of his insolvency would not be essential to the maintenance of an action of assumpsit for such a breach of such a promise, and a demand of contribution, before payment, would, of course, be necessary in such a case.

It is not necessary, however, now to decide whether there is any such promise implied from the act of becoming co-sureties; for there can be no doubt that, without any demand of contribution, prior to payment, an actual payment by one surety imposes on his co-sureties an obligation to indemnify him, so far as the principal can not do it, and that, from such payment alone, the law implies a promise by each co-surety, to discharge such ulterior and contingent obligation; and this suit is founded and attempted to be maintained on that implied assumpsit alone, there having been no attempt to prove a demand, and refusal to make contribution, before payment.

Then it appears to us, very clearly, that this action can not be maintained, unless the plaintiff had shown that he had disposed of the mortgaged estate in a proper manner, and that still the debt now sued for, or some part of it, remains unpaid. In such a case, there should be no recovery against a co-surety, either in equity or at law, without proving an inability otherwise to obtain restitution: *McCormack's Administrator v. O'Bannon's Executor et al.*, 3 Munf. 487 [5 Am. Dec. 509]; *Theobald's Principal and Surety*.

As to the estate mortgaged for the indemnity of the plaintiff in this action, Langhorne is not shown to be insolvent; nor, to that extent, does it appear that the plaintiff has sustained any loss, or needs any further indemnity. The mortgaged estate may not, when properly disposed of, insure full indemnity for the debt now sued for; but a jury can not, with any safety or propriety, determine how far it may be insufficient. It, therefore, seems to us that the only appropriate remedy, according to the facts as they now appear, is a suit in chancery, in which all persons interested being made parties, the proceeds of the mort-

gaged estate might be properly distributed; and then, if there shall be any deficit, a decree for contribution might be rendered, whereby the whole controversy, among all concerned, might at once be wound up, equitably and finally.

Wherefore, as the instructions given by the circuit judge are inconsistent with the principle of this opinion, the judgment is reversed, and the cause remanded.

The distinguishing feature of the principal case is its assertion that a surety can not sustain an action at law against his co-surety for contribution for moneys paid, without showing that the principal is insolvent, or that some reason exists for not pursuing and obtaining satisfaction of him. This, according to a late work upon suretyship, is in opposition to the weight of authority. "In an action at law by a surety against his co-surety for contribution, the insolvency of the principal need not be averred or proved:" Brandt on Suretyship, sec. 254, citing *Judah v. Mieure*, 5 Blackf. 171; *Buckner's Adm'r, v. Stuart*, 34 Ala. 529; *Rankin v. Collins*, 50 Ind. 158; *Roberts v. Adams*, 31 Am. Dec. 694. In equity, this author concedes the rule to be the other way, and to require the surety seeking contribution to show that the principal is insolvent: *Id.*, sec. 254; and he thinks that the rule at law ought to be the same as in equity. The cases in this series, upon the contribution of sureties, may be found by examining *Harrison v. Lane*, 27 Am. Dec. 607, and note; *Cuge v. Foster*, 26 Id. 265; *Henderson v. McDuffee*, 20 Id. 557, 559; *Waters v. Riley*, 18 Id. 302.

FLETCHER'S ADM'R v. SANDERS.

[7 DANA, 345.]

SUIT IN EQUITY MAY BE REVIVED BY ADMINISTRATOR DE BONIS NON, after the death of the administrator by whom it was begun.

JURISDICTION TO GRANT LETTERS OF ADMINISTRATION ON ESTATE OF NON-RESIDENT does not exist in the courts of this state, unless he had assets here at the time of his decease.

ONLY THE COURTS OF THE COUNTY IN WHICH A NON-RESIDENT LEFT ASSETS can grant a probate of his will or letters of administration on his estate.

JURISDICTION OF A PROBATE COURT OF THIS STATE IS PRESUMED, *prima facie*, from its assumption and exercise.

LETTERS OF ADMINISTRATION GRANTED IN ANOTHER STATE OR NATION have, *per se*, no force here.

ASSETS MUST BE ADMINISTERED UNDER AUTHORITY of the local law.

ADMINISTRATORS MUST ACCOUNT TO THE AUTHORITY whence their powers were granted, and can not sue or be sued, in their official character, in a foreign state.

MOVABLE PROPERTY HAS NO SITUS, and, except for purposes of administration, is subject to the law of the owner's domicile; by that law it must be distributed.

ADMINISTRATOR OF THE DOMICILE should, if he can, get possession of the personal assets situate elsewhere. On obtaining such possession, they

will be treated as assets of the domicile, and he will be held accountable for them.

ADMINISTRATOR OF THE DOMICILE is often preferred in granting administration in a foreign country.

ADMINISTRATION IN A FOREIGN COUNTRY IS ANCILLARY to that of the domicile; to the latter any residuum of assets in the former should be transmitted.

ANCILLARY ADMINISTRATOR HAS NO CONTROL over assets situate beyond the jurisdiction whence he derives authority.

SURETY OF ANCILLARY ADMINISTRATOR IS NOT RESPONSIBLE for assets received from a foreign country.

SURETY OF ADMINISTRATOR OF THE DOMICILE IS RESPONSIBLE for assets which lawfully come to his hands from any part of the world.

A BOND IS ASSETS AT THE DECEASED OBLIGEE'S DOMICILE, or at the place where it happened to be when he died.

A DEBT DUE BY PAROL IS ASSETS WHERE THE DEBTOR RESIDES, unless it lawfully comes to the hands of the administrator of the creditor's domicile.

SURETY OF EXECUTORS OF A NON-RESIDENT ON A PROBATE OF HIS WILL GRANTED IN THIS STATE, is not liable for assets received from another state; for, over such assets, the court here had no jurisdiction. (Judge Ewing dissenting.)

DEPOSITION IN CHANCERY READ WITHOUT OBJECTION is evidence for a co-defendant.

AN EXECUTOR IS LIABLE FOR ALL ASSETS OF THE DECEDENT received by him, whether with or without authority.

PARTY MAY BE WITNESS FOR HIMSELF, IF HIS ADVERSARY CONSENT; and his deposition read without objection may operate for himself as well as his co-defendant, especially if he be insolvent and have no real interest.

BILL in equity. The opinion states the case.

M. C. Johnson, for the plaintiff.

Mr. Owsley, for the defendants.

By Court, ROBERTSON, C. J. John Bartlett, having, by his last will, published in the year 1813, devised to his wife Margareta, after the payment of his debts, all his estate, consisting chiefly of his joint stock in the mercantile firm of Bartlett & Cox, in the city of New Orleans, and of about seven thousand dollars on deposit in a bank at Cincinnati, in Ohio, and of some household furniture in Kentucky; and having died, early in the year 1814, in the said city of New Orleans, in the State of Louisiana, where he was then domiciled, Joseph H. Hawkins and Lewis Sanders, of the city of Lexington (who, together with Samuel Winter and William W. Montgomery, of the city of New Orleans, were nominated as the executors of the will), had the same proved and admitted to record in the county court of Fayette, in which the city of their residence was situated; and, having taken the oaths prescribed by law, executed an executorial

bond, in the penalty of twenty thousand dollars, with James Wier as their surety, and with a condition requiring them, among other things, "well and truly to administer according to law" "the goods, chattels, and credits" of the testator, which should come to their "hands, possession, or knowledge."

On the twenty-fifth of January, 1816, Joseph H. Hawkins bought Mrs. Bartlett's interest, as a devisee, in the mercantile establishment of Bartlett & Cox, for which he agreed to pay her whatever James Morrison, Charles Wilkins, and William W. Montgomery should determine to have been the value of it on the first of January, 1816; and afterward he advanced to her about seventeen thousand dollars.

Sanders and Hawkins sold, in Lexington, the household furniture belonging to the testator at his death, for about nine hundred dollars, and disposed, also, of the money deposited by him in the Cincinnati bank, nearly the whole of which latter sum was applied to the payment of an individual debt, due by Sanders to the same bank; and seven hundred dollars of the furniture sale was received by Hawkins, the residue by Sanders. But they never either reported any inventory of the testator's estate, or made any settlement with the county court of Fayette.

Mrs. Bartlett having intermarried with Thomas Fletcher, and afterward died, her husband, who survived her, was qualified as her administrator, and, in February, 1824, he brought a suit in chancery, in the Fayette circuit court, against Sanders and the surety, Wier, alleging that Hawkins having died insolvent, no person had been appointed his personal representative, and praying for a decree for an account of the personal estate of the testator. And, the administrator having died during the pendency of the suit, it was revived in the name of Richard Hawes, as administrator *de bonis non*.

The answer of Sanders contains nothing material, except what will be hereafter noticed; and that of Wier required proof of most of the more important allegations; denied that the county court of Fayette had jurisdiction to grant probate of the will, and insisted that, if that court had any jurisdiction, it was circumscribed to the assets which might have been subject to administration in Kentucky, and that the executorial bond, if binding at all, should be deemed obligatory on him, as surety, to no greater extent than those local assets.

The circuit court having dismissed the bill, the following questions are presented for revision: 1. Could the suit be revived in the name of the administrator *de bonis non*? 2. Had the county

court of Fayette any jurisdiction? 3. If it had, to what extent was Wier's bond obligatory on him as surety? 4. Was the plaintiff in error entitled to any relief, and, if any, what?

1. Whatever might be the technical rule in an action at law, we have no doubt that, in equity, a suit brought by an administrator, may be revived and prosecuted by an administrator *de bonis non*, after the administrator's death: 1 Williams on Executors, 597; *Owen v. Curzon*, 2 Vern. 236; Mitf. Pl. 64, 4th ed., n. 9.

2. As the proof leaves no room for doubting that the testator's domicile was in the state of Louisiana, where he died, no court in this state had jurisdiction to grant probate of his will, or letters of administration, unless he had assets here. Nor, although the fact of his having household furniture within the limits of Kentucky, at the time of his death, as well as at the date of the probate, has been admitted by Wier, would the county court of Fayette have had any jurisdiction, unless that property, or some of it, had been in the county of Fayette; and there is no positive proof, as against Wier, that any of it was there; for, though Sanders, in his answer, says that it was all there, yet his answer is not, as to such a matter, conclusive against Wier, who admits only that the testator had assets in Kentucky.

But the practical doctrine is well settled, that the assumption of jurisdiction by a probate court of this state is *prima facie* evidence of the fact that such court had rightful authority to act as it did, and throws on any person who may deny its jurisdiction the burden of proving that it had transcended its authority. Proof of the fact that Bartlett was not domiciled in Kentucky may, perhaps, have been sufficient to countervail the presumption of jurisdiction arising from the mere assumption of cognizance by the county court of Fayette. But, then, the sale of the furniture in Lexington, and the admission by Sanders, coupled with that of Wier, should, in our opinion, be sufficient to confirm the *prima facie* presumption of jurisdiction in that court, in the absence of any other fact to the contrary than that of the testator's foreign domicile at the time of his death. We are, therefore, of the opinion that the fiducial bond taken by the county court of Fayette is, to some extent, at least, obligatory on Wier, as a statutory bond.

3. It is a well-settled doctrine that letters of administration, granted by one nation or state, can have no operation, *per se*, within the jurisdiction of another nation or state; and that, therefore, such authority, being local, can, *de jure*, vest no right of suit in any other country than that in which it was granted;

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for, as it is the duty of every government to secure to its own citizens a just participation in the distribution of the assets within its protection and control, belonging to every deceased debtor of any of those citizens wherever he may have lived or died, it is an established rule of international law that assets shall be administered under the authority of the local sovereign; and, consequently, as every administrator must, also, account to the proper tribunal of the country from which he derived all his authority, he is responsible to no foreign government for the administration of assets received under that authority, and can not either sue or be sued in his representative character in a foreign state: Story Conf. L. 422, and the numerous cases therein cited.

But, nevertheless, movable property having no *situs*, because it is deemed personal—and, therefore, subject to the law of the owner's domicile, in every respect, except for the purposes of administration—it should be distributed according to the law of that domicile: Id. 420; and, therefore, if an administrator appointed under the law of the domicile can rightfully get possession of assets anywhere, it would be but right that he should do so; and, of course, if he should be permitted to get into his hands assets from a foreign country without suing for them, and without obtaining new letters of local administration, they may be deemed assets in his hands at the domicile, and he may be responsible for the administration of them according to the law of the domicile. And if he can not lawfully get possession of such assets in a foreign country without subjecting himself to the responsibilities of a local administration, it would be right to endeavor to obtain such local authority, unless some other person shall have been appointed to administer those assets: Ram. on Assets, c. 16, p. 235, and 2 Williams on Executors, 1016.

Ex comitate, however, the administrator of the domicile will generally be preferred in the granting of letters of local administration in a foreign country. But, whoever shall be the administrator appointed to administer assets in any country than that of the domicile, his administration will be ancillary to that of the domicile; and, therefore, if, after accounting according to the local law, any residuum of assets shall remain in the hands of the ancillary administrator, they will belong to the domicile, and should be transmitted to the principal administrator there, to be finally administered or distributed according to the law of the domicile: Story Conf. L. 423.

It is an obvious consequence, from the foregoing considera-

tions, that an ancillary administrator can have no control over assets which are not subject to the law under which he was appointed, or over assets elsewhere than within the jurisdiction of the sovereignty from which he derived his authority; and, consequently, as his surety will be liable only for his faithful administration of such assets as he had a right to receive, and was, therefore, bound to administer, he would not be chargeable for the misapplication of assets received, without authority, anywhere else than in the country in which the administrator was appointed.

But, as an administrator of the domicile may have authority to receive assets anywhere, his surety will be responsible for all the assets which shall have lawfully come to his hands from any part of the world, and which he has not legally administered. Then, had Sanders and Hawkins been local administrators, instead of executors, there could be no doubt that Wier, as their surety, would not be liable to any greater extent than the amount of assets which had come to their hands in Kentucky, or which it was their duty to get into their possession in this state. See, also, *Goodin v. Jones*,¹ 3 Mass. 515; *Stephens v. Gaylord*,² 11 Id. 266; *Cutter v. Davenport*, 1 Pick. 82 [11 Am. Dec. 149]; *Hooker v. Olmstead*, 6 Id. 482; *Daniel v. Inker*, Dyer, 305; Cro. Eliz. 472; and *Hilliard v. Scott*,³ 1 Lord Raym. 562.

In the case just cited, in Dyer's reports, the court decided that a release by an ancillary administrator in Ireland, of the amount of a bond which was in England at the date of the obligee's death, who was domiciled in England, should not exonerate the obligor from liability to pay the amount of the same obligation afterward to the administrator of the domicile, who alone was entitled thereto, and in whose hands alone, therefore, the amount of it, when paid, was assets, even though the debtor lived in Ireland. It has been decided, also, that a payment in one state to an administrator of the domicile in another state, who had a right to receive the debt so paid, would exonerate the debtor from other and future liability for the same debt elsewhere: *Stephens v. Gaylord*, *supra*; Story Conf. L. 431. And it has been, moreover, decided that an administrator of the creditor's domicile may have a right, in a foreign country, to receive a debt from a debtor there: *Doolittle v. Lewis*, 7 Johns. Ch. 49 [11 Am. Dec. 389]; *Atkins v. Smith*, 2 Atk. 63; *Shultz v. Pulver*, 3 Paige, 182.

1. *Goodwin v. Jones*; 8. C., 3 Am. Dec. 173.

2. *Stephens v. Gaylord*.

3. *Hilliard v. Cox*.

But it was said by Chief Justice Parsons, in the case of *Goodwin v. Jones, supra*, that even the administrator of the domicile would have no right to receive a simple contract debt due to his intestate by a person residing, at his death, in a foreign state. That dictum should, however, be restricted to a case in which, at the time of payment, there was a local administration: Story Conf. L. 431, n. 2. It seems to be well settled, too, that a bond will be assets in the country of the deceased obligee's domicile, or in the country where the bond happened to be at the time of the obligee's death; but that a debt due by parol contract will always be assets in the state where the debtor resides, unless it shall lawfully come to the hands of the domiciliary administrator. It is evident, therefore, that, if Sanders and Hawkins had been ancillary administrators, instead of executors, the money on deposit in Cincinnati could not have been assets in their hands, for which Wier, as their local surety, would have been liable, especially as the money never was brought to this state.

Does the fact that they were executors, having legal authority to receive debts due to their testator anywhere, without a probate of his will, or the execution of a fiducial bond, enlarge the obligation of their Kentucky bond, co-extensively with such independent and pre-existent common law power, derived from the will merely? We think not. Their surety's liability is still, as we think, limited to the assets which rightfully came, or ought to have come, to their hands in Kentucky. In this respect, we have seen no case or dictum which discriminates between administrators and executors; and we can perceive no sufficient reason for any such discrimination.

The probate in the county court of Fayette gave to the executors no authority beyond the limits of Kentucky. That court of probate had only a special and limited jurisdiction, confined to the assets in this state. The object of the bond given was to secure the faithful administration of those assets only, and to compel the executors to account for them, and them only, to the court which granted the probate and took the bond. So far, and only so far, as the probate in the county court of Fayette gave authority to the executors, it was the province of the court, and the intention of the legislature, to require security, that they would act faithfully within the sphere of duty prescribed by the laws of Kentucky. The obligation of the bond should, therefore, be limited by the jurisdiction of the court in which it was given, and by the object of requiring it; and the condition of the bond given, in this case, is not only constructively, but ex-

pressly circumscribed within those just and reasonable bounds. The condition—being that prescribed by the statute of 1797, 1 Stat. L. 659—requires the executors, first, to make an inventory of all the assets which shall come to their knowledge or possession; secondly, to exhibit that inventory in the county court of Fayette, whenever “thereto required by the said court;” thirdly, to administer, according to law, “the same goods, chattels, and credits;” and, fourthly, “to make a just and true account of all (their) actings and doings therein, when thereunto required by the said court.”

From the character of these requisitions, it is evident that, in requiring an inventory to be made and reported to the county court of Fayette, of “all the goods, chattels, and credits of the deceased,” the county court contemplated only such “goods, chattels, and credits” as would be assets in Kentucky, over which alone that court could have jurisdiction, and concerning which only it could require an account and settlement. Such, in our opinion, is even the literal import of the condition of the bond as given in this case; and a condition more comprehensive would have been unreasonable: 1. Because the jurisdiction of the county court of Fayette being limited to the assets in Kentucky, that court had no authority to require a bond for any other purpose than that of securing the faithful administration of those local assets; and, 2. Because, if executorial bonds had been, as they ought to have been, and possibly were, given in Louisiana and in Ohio, surely all the sureties in the three states could not have been made contributory for any defalcation of the executors in any one, or in all of them; and, *a fortiori*, if there was a foreign administration, with the will annexed or otherwise, Wier, as surety of the executors in Kentucky, could not have been held responsible for assets received in such foreign state, and never brought to this state

But Wier's liability on his bond, and according to the condition thereof, can not depend on the accidental circumstance of the execution or non-execution of a similar bond by others in Louisiana or Ohio. It, therefore, seems to us that Wier is liable only for assets which came to the hands of the executors in Kentucky. And, consequently, as the money on deposit in Cincinnati was never in this state, nor subject to the power of the county court of Fayette, he is not responsible therefor.

In this conclusion Judge Ewing does not concur.

Nor is Wier liable for the assets in Louisiana: because, 1. They never were in Kentucky; and, 2. The legatee sold all her

interest therein, and was, therefore, afterward entitled to no claim therefor on the executors.

4. As, according to the foregoing considerations, Wier is not liable for any portion of the testator's estate which never came to the hands of either Hawkins or Sanders in Kentucky, he can not, in any event, be made responsible in this suit for more than the amount for which the furniture was sold in Lexington.

The questions yet to be considered, therefore, are: 1. Whether there should have been any decree against Wier, on account of that furniture; and, 2. What should have been the decree as to Sanders.

Though it does not appear that Hawkins paid to Mrs. Bartlett on account of her interest in Louisiana, more than she was entitled to receive under their contract, yet it appears that he had advanced to her, altogether, seventeen thousand dollars, at least; and it does not appear that as much as seventeen thousand dollars had been, or ought to have been, paid to her in fulfillment of that contract. Littleberry Hawkins, the only witness whose deposition alludes to the specific sum paid, or to have been paid, by Joseph H. Hawkins, for Mrs. Bartlett's interest in the house of Bartlett & Cox, says that he (J. H. Hawkins) "agreed to give Mrs. Bartlett between fifteen thousand and seventeen thousand dollars for said interest;" and also says: "I have heard my brother (the said J. H. H.) and Mrs. Bartlett both say, he had complied with his engagement to her in that purchase."

Sanders, in his answer, says that Bartlett's estate being very much embarrassed with debts, and Mrs. Bartlett needing the means of immediate support, she, "for a valuable consideration, sold and transferred to the said Joseph H. Hawkins her entire interest in the said estate of her husband;" and that Hawkins afterward paid to her, in fulfillment of that contract, sixteen thousand dollars, and also, in addition thereto, furnished a house for her, with furniture which cost more than the amount (nine hundred dollars) for which Bartlett's furniture had been previously bought by Hawkins himself. And, in his deposition (by which party taken, it does not appear), Sanders states the same facts, and says that it was known, when Bartlett died, that he was, as a deputy quartermaster-general, largely indebted to the United States, and that the money deposited in the Cincinnati bank had been placed there to his credit, as quartermaster-general, for the purpose of paying that debt, or a portion of it; and also says, that he believes that Hawkins had paid Mrs.

Bartlett "the whole sum agreed on," for her entire interest in her husband's estate. And that deposition, having been read without any objection, must be admitted as some evidence—so far, at least, as Wier is concerned. In addition to those facts, it does not appear that Mrs. Bartlett's interest in the house of Bartlett and Cox was ever estimated as of a higher value than the amount (that is, between fifteen thousand and seventeen thousand dollars), which L. Hawkins said that his brother had agreed to pay, and did pay, for it. It has even been proved that the interest was not worth more than twelve thousand dollars in the year 1821.

These circumstances conduce persuasively, and, in the absence of any countervailing fact, we think sufficiently to prove that Hawkins had paid Mrs. Bartlett for the furniture he had bought at the sale in Lexington; and this deduction is fortified by the additional fact that, though she survived her husband at least eight years, the record contains no intimation that she ever pretended to assert or to be entitled to any claim to the money for which the testator's furniture had been sold, or to any other interest in his estate; and by the fact, also, that, according to the evidence now before us, we should presume that seventeen thousand dollars was more than her residuary interest in the whole estate of the testator was in fact worth, even if her interest had been certain and immediate, instead of being remote and contingent. The consequence is, that the decree dismissing the bill was, as to Wier, right.

In this conclusion Judge Ewing concurs

As to Sanders, the question is somewhat different. As an executor, he is chargeable, independently of his fiducial bond, for whatever of assets he received anywhere, and did not legally appropriate. He is liable, therefore, for the money appropriated by him in Ohio to his own use; and if Mrs. Bartlett never parted with her residuary interest therein, he might be liable to her representative in this suit; for though the value of her interest depends on the extent of the testator's indebtedness, and though so much of his debt to the United States as would absorb more than the entire sum deposited in Cincinnati, still appears to be unpaid, yet, after so long a lapse of time without payment, the mere existence of the debt should not prevent a decree in favor of her representative, upon the condition of executing a refunding bond

But as it is evident that Mrs. Bartlett, as well as the executors, was apprised of the existence of the debt to the United States.

and of the fact, also, that the deposit in Cincinnati had been made in the name of her deceased husband, as deputy quartermaster-general, for the purpose of meeting that debt, and as, moreover, the amount advanced to her by Hawkins seems to have exceeded the probable value of her interest in the whole estate (deducting that deposited as already appropriated), we think that it is altogether probable, without Sanders' own deposition, that she had relinquished her ulterior interest in the Cincinnati deposit, and had, in fact, been paid for her entire interest as residuary legatee. It is very probable that, aware of the indebtedness of the testator to the United States, she and the executors considered her interest in the house of Bartlett & Cox as much as she could ever be entitled to, as residuary legatee; and that, in selling that interest specially, as she did to Hawkins, by a written contract, she intended to part with her whole interest in the testator's estate. That deduction is, as before suggested, fortified by her apparent acquiescence and satisfaction during her life.

But as Sanders' deposition was read without objection, we must infer that it was admitted as evidence for himself, as well as for Wier, and the more especially as his own insolvency divested him, in fact, of real interest in the event of the suit. A party may be a witness for himself, if his adversary consent. Sanders' deposition should, therefore, be entitled to some effect, even on the question whether there should be any decree against himself; and being not only uncontradicted, but fortified, as it is, by other facts in the record, we think that there should have been no decree against him; and, being insolvent, a decree against him was not sought, and would not, as we presume, be now desired.

In this conclusion Judge Ewing concurs.

Wherefore the decree of the circuit court is affirmed.

AUTHORITY OF EXECUTOR, ADMINISTRATOR, OR CURATOR IS LIMITED within the jurisdiction in which he was appointed: *Schneller v. Vance*, 23 Am. Dec. 140. Hence, an administrator appointed in another state can not release a debtor here, so as to bar an action by the local administrator: *Vaughn v. Barret*, 26 Id. 306. An administrator is not chargeable with assets of the decedent in another state, though they may have come into his hands: *Mothlund v. Wireman*, 23 Id. 71. Law of a decedent's domicile, at the time of his death, governs the distribution of his personal estate wheresoever situate: *Dorsey's Ex'r v. Dorsey's Adm'r*, 22 Id. 71, and note to *Bryan v. Moore*, 13 Id. 349. But his assets may be collected and distributed under and in accordance with the law of the country where they happen to be: *Miller's estate*, 24 Id. 345. They must then be transmitted to the executor

or administrator of the decedent's domicile, local creditors first being paid: *Hunter v. Bryson*, 25 Id. 313.

FOREIGN ADMINISTRATORS AND EXECUTORS, RIGHTS, POWERS, LIABILITIES, AND DUTIES OF: See *Glenn v. Smith*, 20 Am. Dec. 452; *Hearns v. Burnham*, 17 Id. 228 and note; *Cutter v. Davenport*, 11 Id. 149; *Doolittle v. Lewis*, Id. 389 and note; *Evans v. Tatem*, Id. 717 and note.

GRAY v. AYRES ET AL.

[7 DANA, 375.]

THE RIGHT WHICH PRIVATE PERSONS HAVE TO ABATE A PUBLIC NUISANCE must be confined to the removal or destruction of that which is necessarily a nuisance or the cause of one in its present location.

A HOUSE, NOT OF ITSELF A NUISANCE, can not be lawfully destroyed by private persons, because the use to which it is put is a public nuisance, as where persons assemble therein for immoral and unlawful acts.

A DISTINCTION EXISTS BETWEEN A PHYSICAL NUISANCE, and one which consists of immoral and unlawful conduct carried on in a particular house; the former may be abated by force, while the latter can not.

ASSAULT AND BATTERY IS NOT JUSTIFIED by a plea showing that the persons injured kept a disorderly house, and were injured in their attempts to prevent the defendants from destroying and abating it as a public nuisance.

ACTION for assault and battery. The opinion states the case.

Thompson, for the plaintiff.

Davies, for the defendants.

By Court, MARSHALL, J. This action was brought by Gray against Ayres and others, for an assault and battery, which is alleged in the declaration in the usual form, and also with the additional charge that the defendants tarred and feathered the plaintiff, and tore his clothes. The defendants pleaded two pleas of justification, to each of which the plaintiff demurred; and the demurrers having been overruled, and judgment in bar rendered against the plaintiff, he has brought the case to this court.

Each of the pleas purports to answer the whole declaration, and, as neither of them either denies or justifies the charge of tarring and feathering the plaintiff, each is on that account insufficient, and each, therefore, should have been adjudged bad on demurrer. But the first plea is, in our opinion, fatally defective in another particular. It alleges, in substance, that the plaintiff occupied a house and close, near the town of Danville, which was the resort of felons, thieves, loafers, and other dis-

honest, vicious, and disorderly persons, by night and by day, and was so kept and allowed to be by him, and was, moreover, kept and used as a repository and receptacle of stolen goods, and was, in fact, and had long been, a public nuisance; whereupon, the defendants, being citizens of Danville, and interested in the abatement of said nuisance, did, for the purpose of abating the same, go upon said close, and throw down the said house, and abate the said nuisance; and that, in so doing, they did necessarily and unavoidably lay their hands upon the plaintiff, and assault him, and, to some extent, beat, bruise, and wound the plaintiff, who resisted and opposed the abatement, etc., but to no greater extent than was actually necessary to effect the abatement, etc.

It is conceded that the facts stated in this plea make out a case of a public nuisance. And the plea is sustained in argument, on the ground that individuals have a right to abate a public nuisance without the aid or authority of any public proceeding. But, although the existence of such a right may have been often admitted or asserted by commentators and judges, without advertent to any exceptions or limitations, it is not, therefore, to be understood that the common law places it above all other rights, and disregards all other principles, in sustaining its exercise. It would be inconsistent with that regard which the common law pays to the peace of society, and to the safety of individuals, to suppose that it has placed in the hands of private men a right so hazardous to these important interests, to be exercised at such time, in such manner, and to such extent, as they may choose, without any responsibility for such acts as they may find it necessary to do in accomplishing their object of abating a nuisance. If the immediate abatement of a nuisance be not absolutely necessary to the safety or convenience of the public, shall individuals be justified in the commission of homicide, or mayhem, or a flagrant battery, because the nuisance can not be now abated without the commission of such acts? Or, if there be two modes of abating a public nuisance, shall individuals be justified in the commission of such acts, because they may become necessary for effecting the abatement in the mode which they have chosen?

But it is not our object to inquire for, or to point out, the various limitations which the reason and justice of the common law may place upon the exercise of this right. A single one, which is inherent in the right itself, and is to be understood in every proposition which asserts it, is sufficient for the present purpose. The right is limited to the abatement of that which

is a nuisance: *Gates v. Blincoe et al.*, 2 Dana 160 [26 Am. Dec. 440], or of that which necessarily causes the nuisance, and which can not exist in its present location and condition, without being or producing a nuisance. A house, or other substantial impediment, erected in a public highway, is a nuisance, which individuals may abate by pulling down or removing the substance which constitutes or causes the nuisance. Whether they may exercise this right under all circumstances, and at all hazards, need not be decided. So, the accumulation and stagnation of water, occasioned by a dam thrown across a running stream, may be a public nuisance, and, so far as it is a nuisance, its removal, or abatement, by individuals, by removing that which necessarily produces the nuisance, or so much of it as does produce the nuisance, may be justified.

But, in the case before us, it was the use to which the house of the plaintiff was appropriated, and the practices which were allowed in it, that constituted a nuisance, and not the house itself; which, neither in its location nor its substance, nor in any matter inseparably connected with it, constituted or produced any annoyance to the public. And although the destruction of the house might have been the most effectual mode of suppressing the nuisance, yet, as the house was not itself a nuisance, nor necessarily the cause of one, its destruction was not a necessary means of abating the nuisance. And if the right of abating is to be confined to that which is the nuisance, or which actually produces, or must necessarily produce it, the right, upon the case made out in the plea, did not extend to the destruction of the house. It may be argued that there is no other mode in which individuals can, at their own pleasure, and by their own act, abate such a nuisance as that presented in the plea, but by pulling down the house in which it exists, or by forcing and keeping the occupant out of it; and that, as the reasoning and conclusion now adopted would alike deny to individuals the right of proceeding in either mode at their own will, and without the sanction of the public authority, it negatives entirely the right of individuals to abate such a nuisance by force. And this negation of the right is, in our opinion, not only a legitimate consequence of the position from which we have deduced it, but is in strict accordance with the most salutary and conservative principles of the law, which holds no private right in higher estimation than that of every individual to protect his person and property, and which subjects neither to invasion on mere private authority, except in those extraordinary cases in

which the right is manifest, or in which the emergency is such as not to await an appeal to the laws.

There is an obvious distinction between a physical or material nuisance, and a nuisance which consists merely in the immoral conduct and illegal practices of individuals within a particular house, and which may be called an unsubstantial or a moral nuisance. The former is properly the subject of direct physical force, and can not be abated or suppressed but by its application; the latter can not be directly reached or affected by external force, and its suppression is more properly the subject of the remedial and vindictory powers of the law. In attempting to abate a physical or substantial nuisance by force, nothing need be attacked save that which is itself the nuisance, or which can not exist in its present physical condition, without producing a nuisance: while, in attempting by force to abate a moral or unsubstantial nuisance, something substantial must be assailed, the existence of which does not necessarily produce a nuisance; for there is no physical or substantial thing which can not exist without producing a moral nuisance.

In these distinctions, and in the greater difficulty of determining as to the existence of a moral nuisance, we think sufficient reason may be found for the conclusion that, although it may be, in general, true that individuals may abate a physical public nuisance by force, it is not, in general, true that they may use force in abating a public nuisance which is not of a physical or substantial nature; and, therefore, it is not true, as a general proposition, that they have a right to abate a nuisance of this kind, or that, in doing so, they may pull down a house, because it is the seat of the nuisance, or beat and wound a man, because he is one of the agents in producing it, or because he resists the destruction of his property. It is an additional argument, that we find no case in which the private right of abating a nuisance of this character has been allowed as a justification for acts of violence upon the person or property of individuals. The nuisance described in this case, though more flagrant, is of the same character as that which is produced by the keeping of a tippling-house, or other house in which disorderly or dishonest persons are encouraged to assemble, for the purpose of pursuing immoral and illegal practices; and although the house be, in such cases, called a nuisance, has it ever been supposed that any and every individual who chooses may pull down a tippling-house, and, if the owner or occupant resist, that he may commit personal violence, and even death, and be justified under an alleged right

to abate public nuisances? Such a doctrine would, in our opinion, be novel and dangerous, and we can not admit that it is a part of the laws of the land.

Wherefore, the judgment is reversed, and the cause remanded, with instructions to sustain the demurrer to each of the pleas, and to render judgment thereon for the plaintiff, unless the defendants shall amend their pleadings.

BUILDING IN WHICH NUISANCE IS COMMITTED may not be destroyed for the purpose of abating the nuisance where it is not the building, but only the purpose to which it is devoted that is objectionable. "A house kept as a house of ill-fame, and as a resort for thieves and other disreputable persons, is a public and common nuisance, but the destruction of the building and its furniture is not necessary to its abatement, and is unlawful:" *Ely v. Supervisors*, 36 N. Y. 287; *Welch v. Stowell*, 2 Doug. (Mich.) 332; *Barclay v. Commonwealth*, 25 Pa. St. 503. In the case of houses devoted to any kind of vice, it is evident that the house is simply a shelter to the vicious persons, and that it might be used as well by the virtuous as by the depraved; that it is the persons and their conduct which constitute the nuisance. Such nuisances are sometimes styled intangible. The right to abate them by destroying the tangible property with which they are associated is generally denied: *Brown v. Perkins*, 12 Gray, 89; *Moody v. Supervisors*, 46 Barb. 659.

BRUBAKER v. PAUL ET AL.

[7 DANA, 428.]

A WOUNDING BY ONE WHO HAS THE RIGHT to lay hands on and remove the injured party is not justified unless he has committed an assault or made such forcible resistance as to render the wounding necessary.

PRESCRIPTIVE RIGHT TO NAVIGATE A CREEK exists, if it is in fact navigable and has been so used for twenty years.

THE RIGHT TO NAVIGATE A CREEK justifies the removal of obstructions therefrom and the use of the force requisite, although a battery or wounding be found necessary.

TRESPASS *q. c. f.*, and for an assault, etc. The case appears from the opinion.

Apperson, for the plaintiff.

Beatty, for the defendants.

By Court, ROBERTSON, C. J. This is an action of trespass *quare clausum fregit*, assault and battery, and wounding. The defendants pleaded two pleas, each admitting the facts alleged in the plaintiff's declaration, and attempting a justification.

The first plea avers that, though the plaintiff was seised of the *locus in quo*, a creek, running through it into the Ohio river, was

frequently navigable in consequence of the reflux of water from that river, when in an ordinary state; that the creek being thus navigable at the time of the alleged wrongs, the defendants had passed up, in a flat-bottomed boat, from the mouth of it, to a point above the place of conflict, for the purpose of getting a load of pig-iron, and that, on descending with their boat, they discovered that the plaintiff had felled a tree across the creek, and was standing on it, with an ax, menacing forcible resistance to a removal of the obstruction; and that, not being able to descend with their boat, without first removing the tree or log, they gently laid their hands on the plaintiff, and removed the obstruction, using no other force than that which was necessary for that purpose.

The second plea, after averring the same facts in substance, also averred that the creek had been occasionally used by the public as a navigable stream for more than twenty years, and that the plaintiff having assaulted the defendants, they in self-defense, necessarily beat and wounded him "a little," and used, also, as much force as was necessary for removing the log or tree, and no more. The circuit judge overruled demurrers to the pleas; and the plaintiff refusing to reply to either of them, judgment was thereupon rendered in bar of his action.

The first plea does not present a bar to the entire action. It does not justify the wounding. A right to remove the obstruction, and for that purpose to gently lay hands on the plaintiff who was standing on it, with his ax, did not, *per se*, justify the wounding. To make out such a justification, it would have been necessary to aver that the plaintiff had assaulted the defendants, or that he made such resistance with force as rendered the battery and wounding necessary. *Mollitur manus imposita* does not alone justify a wounding, though it may justify a mere battery: Cro. Eliz. 94,¹ 243;² *Gates v. Lounsbury*, 20 Johns. 427; *Gregory et ux. v. Hill*, 8 T. R. 299; *McIlroy v. Cochran*, 2 A. K. Marsh. 271.

But the second plea is, in our judgment, sufficient *prima facie* to justify the wounding, as well as the battery, and the removal of the tree. If, as alleged, the creek was, in fact, navigable, and had been used as such for twenty years, the defendants, as a portion of the general public, had a legal right to navigate it with their boat. To entitle them to such a privilege, it was not necessary that the sea tide should have ebbcd and flowed in the creek. Such a doctrine here would not be consistent with

1. *Jerome v. Phear*.2. *Barret v. Hewett*.

either reason or public policy, or adjudged cases in this country: *Hooker v. Cummings*, 20 Johns. 97 [11 Am. Dec. 249], and the cases therein cited.

The alleged prescription for more than twenty years, would *per se*, in the absence of any other fact, be sufficient to show that the public had a right to use the creek for purposes of navigation with boats, subject, of course, to all the residuary and consistent rights of the riparian owner. The analogies of the modern doctrines of prescription designate twenty years as the fixed period in all cases. Then, having a legal right to navigate the creek, the defendants had an undoubted right to remove the obstruction, and to employ as much force as was necessary to that end. And the alleged assault was *prima facie* a justification of the wounding: Authorities *supra*; *Shain v. Markham*, 4 J. J. Marsh. 579 [20 Am. Dec. 232]; 3 Chit. Pl. 1069; Com. Dig., Pl. 3 M, 15, 16.

Every assault may not justify a wounding, nor even an unnecessary battery: Salk. 642. But the plea in this case avers that, in repelling the alleged assault, and defending themselves, the defendants employed no more force than was necessary. That averment is admitted by the demurrer. And the plea must, therefore, be deemed sufficient to show that the wounding was rendered justifiable by the assault. Had the wounding been wanton, or unnecessary for proper self-defense, that fact should have been replied. Wherefore, though the circuit judge erred in overruling the demurrer to the first plea, nevertheless, as the second plea, which was good, remained unanswered, the final judgment in bar of the action was proper; and, therefore, the plaintiff has not been prejudiced.

Wherefore, the judgment is affirmed.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

WALLEY v. SCHOONER LIBERTY.

[12 LOUISIANA, 98.]

PUBLIC ARMED VESSEL OF FOREIGN STATE at peace with the United States, is exempt from the jurisdiction of our local tribunals while enjoying in a friendly manner the hospitality of our waters.

THE ADMISSION BY US OF THE EXISTENCE OF A CIVIL WAR between two foreign powers, entitles both to the sovereign rights of war, and to claim from us the obligations of neutrality, although we have not acknowledged the independence of one of the powers.

PLAINTIFF alleged that the schooner *Liberty* was indebted to him seven hundred and seventy-five dollars and eighty cents for supplies furnished; and prayed her seizure and sale to satisfy the demand. **Bass** intervened and asserted a like claim. The republic of Texas, appearing by counsel, asserted that the schooner was one of its armed, national vessels, and therefore not liable to seizure.

Buchanan, for the plaintiff.

Lockett, for the Texan republic.

By Court, **BULLARD, J.** In this case the new republic of Texas, before its independence was recognized by the government of the United States, but while engaged in hostilities with Mexico, and treated by our government as a belligerent, interposed a claim for the restoration of the schooner *Liberty* as a public armed vessel of that power, which had been seized under process issued from the parish court. Its release and restoration were decreed, and the seizing creditors appealed.

It appears to be a settled principle of international law, as

taught by elementary writers, and recognized by the highest judicial authority of the Union, that a public armed vessel of a foreign state at peace with the United States, while enjoying in a friendly manner the hospitality of our waters, is exempt from the jurisdiction of the local tribunals: 7 Cranch, 116.¹

Whether the new state of Texas at the time this claim was set up, and before its independence was acknowledged by the United States, could be regarded as a sovereign power, and entitled to assert such an exemption as is claimed in this case, appeared to us at first a question of more difficulty. On the one hand, it certainly is not a judicial question, whether Texas be or be not a sovereign power; nor is it strictly a political question to be settled by a different department of the government. On the other hand, it appears equally clear, that when the government of the United States has admitted the existence of a civil war between any two foreign powers, whether it has entered already into any diplomatic relations with either, or not, both must be regarded as belligerents and entitled to all the sovereign rights of war, and consequently may claim from us all the obligations of neutrality. During the protracted struggle between Spain and her American colonies, the United States, long before the independence of the latter was acknowledged, recognized the existence of a civil war, and assumed a neutral attitude in relation to the parties as belligerents. In the case of *The Santissima Trinidad*, the supreme court of the United States held, that all the immunities which may be claimed by public ships in our ports, under the law of nations, must be considered in such a state of things as equally the right of each party to the war, and as such must be recognized by our courts until congress shall pursue a different rule: 7 Wheat. 283, *et seq.*

But it is contended, that the authority of the attorney, as agent to represent the new republic, is not shown, and that a government can only be represented by a duly accredited agent. This argument assumes as a principle, that in a case of this kind, the sovereign must make himself a party in the court of the neutral, and consequently, submit himself to its jurisdiction. But in the case of *The Exchange* first alluded to, which was that of a French national vessel, the supreme court entertained the question without requiring the government of France to intervene, and proceeded to pronounce its judgment on a mere suggestion of the attorney-general.

It is therefore ordered, adjudged, and decreed, that the judgment of the parish court be affirmed, with costs.

1. *The Schooner Exchange v. McFaddon.*

WALDEN v. LOUISIANA INSURANCE CO.

[12 LOUISIANA, 134.]

INSURER HAS RIGHT TO BE INFORMED OF EVERY FACT creating or increasing the risk.

OMISSION TO NOTIFY INSURER OF RECENT ATTEMPT TO BURN A BUILDING next to that on which insurance was sought, was held to vitiate the policy obtained.

ACTION on policy of insurance against fire. Defendants recovered judgment. Plaintiff appealed. The opinion states the material facts.

F. B. Conrad, for the plaintiff.

Strawbridge, for the defendant.

By Court, MARTIN, J. The plaintiff is appellant from a judgment, which rejected his claim for the value of a house, insured by the defendants, and which was destroyed by fire. The facts of the case are these: A ropewalk, which was so contiguous to the house, that the destruction of the former by fire must necessarily have involved the latter in the like calamity; it was rumored, that an attempt had been made to set fire to the ropewalk, which induced the plaintiff to insure the house. The defendants resisted his claim, on the ground that he had not communicated the circumstance which had excited his alarm and determined him to insure.

It appears to us, the district court did not err. The underwriter has an undoubted right to be informed of every circumstance, which, creating or increasing the risk against which insurance is sought, may induce him to decline the insurance, or demand a higher premium. It appears from the defendant's own confession, that the attempt which had been made, to set on fire a building, which could not have been consumed without materially endangering his house, created in him an alarm, which prompted him to guard against the danger. It is true, he evidently acted in good faith; for when he called on the defendants for indemnification, he candidly informed them of the circumstance which had alarmed him. His ignorance of his duty can not protect him against his omission to give information of a material fact, which the defendants had a right to know, in order to establish the proper rate of insurance.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

INSURANCE.—OMISSION TO STATE FACTS material to the risk has ever been considered as fatal to the interests of the insured: *Curry v. Comm. Ins. Co.*,

20 Am. Dec. 547. Concealing the true state of the property is a fraud upon the insurer, and will vitiate a policy issued by him: *Fowler v. Aetna F. Ins. Co.*, 16 Am. Dec. 460 and note. "Such facts, however, as are unusual, threatening, and not open to general observation, especially if they are the inducement or occasion for the application for insurance, ought to be disclosed, whether inquired about or not. The fact that frequent threats or attempts have been made to set fire to the property for insurance upon which the application is made, is such a one as would naturally attract the attention of the insurers, if known, and modify their estimate of the risk. Withholding would, therefore, amount to a concealment which would vitiate the policy. And the same would be true if the inducement which leads to the procurement of insurance is the fact that attempts have been made to set fire to neighboring property, so situated that if it should burn, the property upon which the insurance is sought would be endangered?" May on Ins., sec. 208, citing the principal case.

CURELL v. JOHNSON.

[12 LOUISIANA, 290.]

ACKNOWLEDGMENT IN A BILL OF LADING that merchandise is in good condition, does not extend beyond its external appearance.

ACTION against defendant, as captain of the ship *Mobile*, for damages on goods shipped at Liverpool to New Orleans. Judgment for plaintiff. Defendant appealed.

Stidell, for the plaintiffs.

Bodin, for the defendant.

By Court, CARLETON, J. We have carefully examined the testimony coming up with the record on this case, and we are not altogether satisfied, that the damage complained of, happened to the goods on their transit to New Orleans, through the fault and neglect of the defendant.

The judge appears to base his judgment mainly upon the testimony of two witnesses, whose mere opinions are opposed by the facts fully attested and not controverted; that the goods in question were stored between the fore and main hatches, upon crates of empty porter bottles, and surrounded with other merchandise, which arrived in good order. It appears to us, the defendant has gone far to prove affirmatively, that the fault was not his own; and although he acknowledged, by the bill of lading, that he received the merchandise in good condition, yet we do not understand his acknowledgment to extend beyond the external appearances of the boxes in which they were packed. Had a jury, acquainted with such matters, passed upon the controversy between the parties, it might not have been our duty to

disturb their verdict. But as the subject presents itself to our mind, it does appear to us, that the plaintiff has not satisfactorily made out his case, and that the judgment of the court is erroneous.

It is therefore ordered, adjudged, and decreed, that the judgment of the parish court be avoided and reversed, and that there be judgment for the defendant, as in case of nonsuit, with costs in both courts.

VIGERS ET AL. v. THE OCEAN INSURANCE CO.

[12 LOUISIANA, 362.]

PREVENTION OF VESSEL BY A BLOCKADING SQUADRON from entering her port of destination, and requiring her to return to her port of departure, entitles her owners to recover on a policy by which she was insured against "the arrests, restraints, and detainments of kings, princes, people," etc. A RESTRAINT EXISTS, THOUGH THERE BE NO SEIZURE, if the power of the blockading squadron is applied so effectually and directly as to break up the voyage.

ACTION on policy of insurance. The opinion states the case. Judgment for plaintiffs; appeal by defendants.

Eustis, for the plaintiffs.

Conrad, for the defendants.

By Court, BULLARD, J. This case presents the question of a right to abandon as for a total loss on the part of the assured, under the following circumstances:

The insurance was upon merchandise on board the schooner *Sarah Ann*, bound from New Orleans to Tampico, in the republic of Mexico, and against the usual sea risks and also against "arrests, restraints, and detainments of all kings, princes, or people, of what nation, condition, or quality soever," etc. On the arrival of the schooner off the bar of Tampico, she was boarded by an officer from the French squadron, then and yet employed in a vigorous blockade of Tampico and other Mexican ports in the gulf, who gave formal notice to the master of the schooner, that all the Mexican ports were under strict blockade by the squadron of ships of war of the king of the French; ordered him to leave the coast with his vessel, and indorsed the notice upon the *role d'equipage* of the schooner. Permission was refused to come to anchor, or to land the passengers, or to take in supplies. Under these circumstances, the master of the schooner, after remaining for some time under the guns of a brig of war belonging to the French squadron, returned to New

Orleans. It is admitted, that the blockade still continues, and the evidence shows, that it is rigorous and with an adequate stationary force.

It appears to us clear, that any further attempt to enter the port of destination on the part of the schooner, might have been followed by a forfeiture of the vessel and cargo without any recourse upon the underwriters, and that the master could not have gone to any other port, without equally forfeiting his insurance. He had, therefore, no alternative left but to return to the port of departure, and the voyage or adventure was entirely broken up; not by a vague apprehension of danger, but by a direct application of superior force. It was a restraint, in our opinion, according to a sound construction of the policy of insurance.

If the question presented by this case, was at one time unsettled, and the decisions of state tribunals variant, if not contradictory, as would appear from the cases to which our attention has been called in the argument, we can not but consider it as now at rest by the highest judicial authority of the union. The case of *Olivera v. The Union Insurance Company*, decided by the supreme court of the United States, 3 Wheat. 183, can not be distinguished in principle from this. The only difference in point of fact is, that in that case, the vessel was prevented from leaving the Chesapeake, upon her destined voyage, by a blockading squadron, and in this, the schooner was restrained from entering her port of destination, after having nearly completed her voyage. The same force was applied, the same notice given, and in both cases, the vessel was compelled to put back to the port of departure. If, instead of a blockade of Tampico, it had been a blockade of the mouths of the Mississippi, and the schooner had been compelled to return from the Balize, the two cases would have been in every essential particular identical. In the case of *Olivera*, the vessel had sailed from the port of Baltimore, bound to the Havana, and on its approaching the mouth of the Chesapeake bay, was boarded by one of the frigates belonging to the blockading squadron, and notified of the blockade, and ordered to return to Baltimore. The reasoning of the great magistrate, who at that time stood at the head of the federal judiciary, in delivering the opinion of the court, applies equally to both cases. The court considered, that a case of *vis major* applied directly and effectually so as to break up the voyage, and that it was a restraint within the terms of the policy, although not attended by any actual seizure or arrest. In com-

menting on the case of *Barker v. Blakes*,¹ the chief justice remarks, "that the court of king's bench thought the blockade of the port of destination constituted a total loss, which was occasioned by the detention of the vessel, but that the abandonment was not made in proper time." "It is also to be observed," he adds, "that the vessel did not attempt to proceed towards the blockaded ports, but lay in Bristol, when the abandonment was made. The blockading squadron, therefore, did not act directly on the vessel, nor apply to her any physical force. It is not certain that such a circumstance might not have materially affected the case." What the chief justice supposes might have happened, and have made a material difference in that case, actually took place in the one now under consideration. The force was directly applied to the vessel when on the point of terminating her voyage, and she was restrained from entering by a force which could neither be resisted nor evaded with safety. That the same restraint still exists, is not only shown in the record but is a matter of notoriety, and it is impossible to predict how long it may continue. Under these circumstances, we are of opinion, that the plaintiffs are entitled to recover as for a technical total loss.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

MARTIN v. JETT.

[12 LOUISIANA, 501.]

SERVITUDE AGAINST A LOWER ESTATE requires it to receive all waters which naturally flow from a higher one.

SERVITUDE MUST NOT BE INCREASED OR CREATED by the industry of man.

THE PROPRIETOR BELOW IS NOT ALLOWED TO ERECT ANYTHING TO OBSTRUCT the natural flow of the waters; the proprietor above must do nothing to make the natural servitude more onerous.

OWNER OF DOMINANT TENEMENT HAS NO RIGHT BY MEANS OF DITCHES to collect in one channel waters which would otherwise remain stagnant or evaporate, or gradually flow off, and discharge them in a mass upon his neighbor.

ACTION for damages arising from stopping up drains, and also for judgment requiring the dam placed across plaintiff's drains to be removed. The defendant pleaded the general denial, and also that the plaintiff had injured him by digging drains and thereby collecting and discharging the waters on defendant's

land. The parties were adjacent proprietors of lands on Red river. The general surface of defendant's land was lower than that of plaintiff's, and water naturally ran on the former from the latter. Plaintiff had judgment. Defendant appealed. The opinion states the facts.

Dunbar, for the plaintiff.

Winn, for the defendant.

By Court, BULLARD, J. The plaintiff seeks to recover damages from the defendant, for illegally erecting a dam or embankment on his land adjoining that of the plaintiff, whereby the natural flow of waters has been obstructed, and his land has been overflowed. The defendant, in answering, denies that he has done anything to the injury of the plaintiff, but alleges, that the plaintiff, on the contrary, has done him great damage, by cutting artificial drains or ditches, on his adjoining tract of land, by means of which his arable lands are overflowed; and he claims damages in reconvention. There was judgment for the plaintiff, and the defendant appealed.

The parties are owners of adjacent tracts of land, and it is clearly shown, that the defendant's tract, which is situated below, owes a servitude to that of the plaintiff, to receive the waters which run naturally from it. The nature and extent of this servitude is clearly defined by the code; it is to receive the waters which naturally flow from the estate situated above, provided the industry of man has not been used to create that servitude; the proprietor below is not at liberty to raise any dam, or make any other work to prevent this running of the waters, and the proprietor above can do nothing whereby the natural servitude may be rendered more burdensome: La. Code, art. 656. If we were to take this last clause in its strict literal sense, no doubt would remain on our minds but that the plaintiff, by cutting numerous ditches on his land, leading to a central reservoir, had greatly aggravated the servitude due by the adjoining estate. By means of such canals, the waters which would otherwise remain stagnant, in several ponds in different parts of the tract, or gradually flow on to the defendant's land, exposed to evaporation, when spread over a wider surface, are collected, and poured in a mass upon his neighbor, and during heavy rains might seriously injure his crop.

But it is contended, that although our code contains no explanatory article, similar to that in the Code Napoleon, which, in controversies like the present, directs the tribunals to decide

in such a manner as to reconcile the respect due to property with the interests of agriculture, yet such ought to be the interpretation of the article in question.

Let us see to what extent the corresponding article in the Code Napoleon has been thought, by able jurists in France, to authorize any artificial works, by which the servitude might be rendered more onerous, with a view of favoring the great interest of agriculture. Duranton, to whose work our attention has been directed, in commenting upon the six hundred and fortieth article of the Napoleon code, which forbids the owner of the superior estate to do anything which might aggravate the condition of the inferior one, says: "Thus, he can not make on his land any works, which would change the natural passage (immission) of the waters upon the inferior estate, either by collecting it upon a single point, and giving it thereby a more rapid current, and more apt to carry down sand, earth, or gravel, upon the land, or by directing upon a point on the same land a much greater volume of water than it would have received without such works," and he cites book 1 of the digest, sec. 1; 1 Duranton, No. 164.

But the same author proceeds to say, that the owner of the superior estate may make any work upon it necessary, or simply useful to the cultivation of his land, such as furrows in a planted field. He may, also, in planting vines, or forming a meadow, make ditches for the irrigation of the meadow, or for the purpose of rendering his vines more healthy and vigorous: 1 Duranton, No. 165. We are by no means disposed to give to the code such an interpretation as would, in effect, condemn to sterility the superior estate. That every man has a right to clear and cultivate his land, can not be doubted. The clearing of land, and fitting it for agricultural purposes, is not calculated to render this kind of servitude more onerous. On the contrary, lands, it is well known, become more dry by being cleared, because evaporation goes on more rapidly. But it is one thing to clear and cultivate arable lands, and another thing to reclaim lands naturally covered with stagnant waters, in such a way as to throw the mass of water, which would naturally remain in pools or ponds, upon the lands of one's neighbor, situated below. The Roman law, which, perhaps, forms the best anticipated commentary upon this part of our code, permitted ditches to be cut by the superior owner, not for the purpose of making the waters flow upon the adjacent land, but for the purpose of improving, by cultivation, his land, and making it more healthy; and laid

down the equitable rule, that he ought not to ameliorate his own land to the injury of his neighbors. "*Sic debere quem meliorem agrum facere, ne vicini deteriore faciat:*" Dig., law 1, sec. 4.

Tested by these principles, and according to the evidence in the record, we find it difficult to concur in the conclusion to which our learned brother in the district court has arrived, that the canals dug by the plaintiff on his land were only such as he had a right to make, for the purposes of cultivation, nor are we enabled to say whether the dam constructed by the defendant, to counteract the injurious effects of such works upon his land, be more than adequate to that purpose. While, therefore, we express our regret, that such a controversy should not be settled by amicable compromise, in such a manner as to reconcile the interests of the parties, we are bound to say, that in our opinion, justice requires the case should be remanded for a new trial.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be avoided and reversed, and that the case be remanded for a new trial; the costs of the appeal to be borne by the plaintiff and appellee.

SERVITUDE TO RECEIVE FLOW OF WATER.—The respective rights and obligations of the owners of adjoining fields to permit the natural flow of the surface water to continue from the one upon the other, have been the subject of much contention in the legal tribunals of this country and elsewhere. In some instances the owner of the lower field has claimed and exercised the privilege of constructing and maintaining embankments or other obstructions, by which the descent of the water was interrupted, and it was thrown back upon the higher lands to the manifest prejudice of their owner; in other instances the owner of the higher field has, by means of artificial cuts and drains, hastened the flow of the waters, precipitating them upon and flooding the lower lands. Many of the courts have declined to interfere between the contestants; and have left the one to dig and the other to bank until the one or the other desisted from sheer exhaustion, or some other cause. Thus, in Massachusetts, it is said that "the obstruction of surface water, or an alteration in the flow of it, affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil." *Gannon v. Hargadon*, 10 Allen, 110; *Parks v. Newburyport*, 10 Gray, 28; *Ashley v. Wolcott*, 11 Cush. 192. The Massachusetts decisions are in conformity to what is understood to be the rule of the common law. This is widely dissimilar from the rule of the civil law. The former was, on this subject, the law of force, and the latter of justice; the former encouraged any use of his land which the owner thought proper or profitable, the latter restricted him to such use as would not damage or depreciate the property of his neighbor. The rule of the civil law, as stated by Pothier is, "each of the neighbors may do, upon his own heritage, what seemeth good to him, in such manner, nevertheless, that he do not injure the neighboring heritage."

The rule of the civil law has been received with constantly increasing favor in the United States. In *Ogburn v. Connor*, 46 Cal. 346, the defendant had filled up a depression in his lands, and thus thrown water back upon the lands of plaintiff. The latter had, in the lower court, been adjudged to be without legal remedy. The supreme court reversed the judgment, and in so doing, quoted with approval the following, from *Martin v. Riddle*, 26 Pa. St. 415: "Nor has the owner of the upper ground the right to make any excavations or drains by which the flow of the water is diverted from its natural channel and a new channel made on lower ground; nor can he collect into one channel waters usually flowing off into his neighbors' fields by several channels, and thus increase the rush upon the lower fields;" and also quoted approvingly the statement of Mr. Washburn, that the owner of the upper field "can not by artificial trenches or otherwise, cause the natural mode of its (the water's) being discharged to be changed, to the injury of the lower field." The right of the proprietor of the higher field to flow the lands below him, if carried to any considerable extent beyond the quantity of water naturally discharged, can not be affirmed without substantially destroying the lower heritage. This right can not be conferred by the legislature, except under circumstances which justify the exercise of the right of eminent domain; and even then just compensation must be made: *Grand Rapids B. Co. v. Jarvis*, 30 Mich. 321; *Eaton v. B. C. & M. R. R.*, 51 N. H. 504; *Nevins v. City of Peoria*, 41 Ill. 509. Where it is sought to prevent the lowering, opening, enlarging, or continuing of ditches leading surface water on to the lands of another, relief may be obtained by mandatory injunctions: *Davis v. Londgreen*, 8 Neb. 43; *Pettigrew v. Evansville*, 25 Wis. 223; *Foot v. Bronson*, 4 Lans. 47; *Goldsmith v. Elsas*, 53 Ga. 186; *High on Inj.*, 2d ed., sec. 751.

Doubtless, where the rules of the civil law prevail, the lower or servient tenement must submit to such water as naturally flows upon it. But the authorities generally state that this servitude must not be augmented or made more burdensome by the industry of man: *Butler v. Peck*, 16 Ohio St. 334; *Laney v. Jasper*, 39 Ill. 54; *Merritt v. Parker*, 1 Cox, 460; *Delahoussaye v. Judice*, 13 La. Ann. 587; *Adams v. Walker*, 34 Conn. 466; *Sharp v. Hancock*, 8 Scott N. R. 46; *Harrison v. G. N. R. R.*, 33 Law J., Exch. 267; *Livingston v. McDonald*, 21 Iowa, 165, 174. In the last-named case the question is, perhaps, more thoroughly and satisfactorily considered than in any other decision upon the subject; and the plaintiff was held entitled to relief against an underground drain, so constructed as to increase the flow of water on his land. "One has no right to cut away or drain natural reservoirs upon his own land, whereby he may reclaim the land occupied by the same, if thereby he causes more water to flow on his neighbor's land. The reclamation of the land is certainly for the advantage of the common weal, as well as of the person owning it, but such reclamation is not allowed by law at the expense of a contiguous owner. I have no right to make my property more valuable by making my neighbor's less valuable." *Angell on Water-courses*, secs. 108 c, 108 j, 108 k; *Wood on Nuisances*, secs. 378, 397, 398.

While the general rule of law is thus explicitly stated, some very embarrassing difficulties arise in its application to particular cases. Thus the law does not unnecessarily condemn lands to sterility, nor deny landowners the right to prosecute such agricultural operations as are ordinarily incident to prudent husbandry. In the mere tilling of land furrows must be made; and these, to some appreciable extent, will lead water off upon lower lands. Or, on the other hand, ridges may result from plowing and thus partially obstruct the flow of water, and compel it to stand upon land whence it would

otherwise descend. In the principal case the court is careful to state that the provisions of the code will not be so construed as to deny to the owner of the superior estate the right to make "any work upon it necessary or simply useful to the cultivation of his land, such as furrows in a planted field. He may also, in planting vines, or forming a meadow, make ditches for the irrigation of the meadow, or for the purpose of rendering his vines more healthy and vigorous." There are other decisions, in which the right to use the lands in a husbandmanlike manner is affirmed.

Certainly it will always be very desirable for the owner of lands overburdened by stagnant or other waters, to relieve his lands by leading the waters elsewhere. Viewed from his standpoint, it is "good husbandry" to rid himself of the water. If he may follow the dictates of "good husbandry," by constructing to or near his neighbor's land a ditch adequate for his relief, the problem is very simple; but its solution certainly involves the practical partial confiscation of the lower heritage. Certainly the cases do not mean this. We think they may be harmonized by assuming that the owner of the dominant heritage may carry on his agricultural operations in the ordinary manner of good husbandmen, without liability for such drainage or obstruction as may incidentally result therefrom; but that he may not construct works whose direct object is flooding the lands of another, although he thereby fits his own for cultivation, and greatly augments its capacity for useful production. Hence, though judges insist that they do not wish to be understood as condemning or restraining good husbandry, they very generally enjoin the continuance of artificial works and devices, having as their natural object the relief of one owner at the loss of another: *Livingston v. McDonald*, 21 Iowa, 174; *Butler v. Peck*, 16 Ohio St. 334; *Laney v. Jasper*, 39 Ill. 54; *Delahoussaye v. Judice*, 13 La. Ann. 587; the principal case; *Curtis v. E. R. R. Co.*, 98 Mass. 428.

If the owner of the upper field seeks to run the waters off, he will necessarily select some point where there is a descent towards the lands of his neighbor, and also a depression in which the waters may be kept united so as to flow off in one body or stream; and he will claim the right to do this on the ground that he is simply availing himself of an ancient, natural water-course, into which he has the right to drain. He will have no difficulty in finding many authorities which support, or seem to support, his claim: *Earle v. De Harl*, 1 Beas. 280; *Martin v. Riddle*, 26 Pa. St. 416; *Miller v. Laubach*, 47 Id. 154; *Washb. on Kase*, 211. The difficulty is in determining whether the water-way which he has found and appropriated is a water-course: "The term water-course is well defined. There must be a stream usually flowing in a particular direction, though it need not flow continually. It may be sometimes dry. It must flow in a definite channel, having a bed, sides, or banks, and usually discharges itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other ordinary causes. It does not include the water flowing in the hollows or ravines in the land, which is the mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which are at other times destitute of water. Such hollows or ravines are not in legal contemplation water-courses." *Hoyt v. Hudson*, 27 Wis. 661; *Shields v. Arndt*, 3 Green Ch. 246. Mr. Washburn shows that the law regulating the servitude which the lower owes the upper estate has been materially modified since the first publication of his work; that this modification is in limiting the servitude and not extending it to such water "as falls upon the surface in the form of rain or

melting snow, although from the nature of the surface, such water, when it does fall, flows in a uniform course or direction:" Washb. on Eas., 3d ed., 454.

The respective rights and obligations of the owners of adjacent property, with respect to the natural flow of the surface water arising from rains or melting snow, have recently been quite exhaustively considered by the supreme court of Missouri. The first case was that of *McCormack v. Kansas City, St. Joseph, and Council Bluffs Railroad Co.*, 70 Mo. 359; S. C., 35 Am. Rep. 431. In this case it appeared that the plaintiff owned about fifty acres of land on the west side of the defendant's road; that part of the land, from two to four acres, was low bottom land, two or three feet lower than the adjacent soil; that this low ground also extended east of the railroad so as to embrace from four to six acres on the east side of the road. The land on both sides had been susceptible of cultivation before the road was built. The road ran north and south, thus dividing the low lands, and forty or fifty rods to the north thereof crossed Contrary creek. The defendant bridged this creek; but the opening left was inadequate to fully discharge the water, which sometimes was so held back as to create a pond three or four feet deep. To relieve this, the defendant cut a sluice or box thirteen by eighteen inches in the lower part of the depression containing the pond, and thereby caused the waters "collected both from the high land adjoining and from the back water of Contrary creek" to escape and greatly injure the plaintiff both with respect to the low lands and to the cellar of his house, some fifty rods distant. The lower court instructed the jury that: "The defendant had the right to construct all such culverts as at any time might be found proper for the protection of the road-bed from water backed up against the road by overflow of a creek or excessive rains, although such culvert or drain may have caused such overflow or rain to flow in a different direction or greater quantity than it had done before such embankment or culvert was made; and in constructing such culvert defendant was only required to use reasonable care, considering all the circumstances at the time of such construction." This instruction and others of like purport were declared incorrect. The appellate court said: "There is a great difference between allowing the surface water and the water accumulated by the overflow of the creek, to percolate through a thousand or ten thousand avenues, as it would have done if no railroad had been there to intercept it, and by an embankment gathering it into one pond, and precipitating it in a single channel on plaintiff's land;" and "it is immaterial how the water got there, whether by natural channels from the hills or highlands, or by back water from the creek; the defendant had no right to concentrate it in a single channel and force it on plaintiff's land. This is the doctrine as established by all the authorities, and the sufficiency or insufficiency of the bridge was entirely immaterial if the back water from the creek did in point of fact find its way into this basin. The defendant had a right undoubtedly to protect its road, and to do so had an unquestionable right to draw off the water, but not so as to be injurious to his neighbor. It must be drawn off in some natural channel, some stream in the vicinity, if any such existed, or by a variety of channels; or, in short, by any means defendant might select or prefer, provided no damage was done to others by the plan adopted." In this case it is clear that the depression into which the water was conducted was a natural depression, and that it had some of the capacity of a natural drain; and the defendants, therefore, probably thought they had the right to use it as a sort of natural water-course. But it is obvious that it is not every place in which water will run down hill or seek its

level, that can be considered a natural water-course, so as to authorize lands to be artificially drained into or upon it, to the damage of its owner or the owners of adjacent lands. Indeed, the more recent adjudications show that draining into a natural water-course may not be exercised to the injury of others, with absolute impunity. Thus, in *Noonan v. City of Albany*, 79 N. Y. 470; 35 Am. Rep. 540, it appeared that the defendant collected the surface water by means of sundry sewers, and discharged it into a ravine. "It passed after its discharge over ground used as a dumping-place for refuse, and down the declivity until it reached the valley or bed of the ravine, and flowing easterly, reached the premises of the plaintiff, and having no sufficient outlet, flooded the plaintiff's lot, and deposited thereon the filth carried by the sewers, and the sand and dirt washed down by the water as it passed over the dumping-ground." "This," said the court, "*prima facie* established a right of action in the plaintiff. A municipal corporation has no greater right than an individual to collect the surface water from its lands or streets into an artificial channel and discharge it upon the lands of another, nor has it any immunity from legal responsibility for creating or maintaining nuisances." The court then referred to preceding cases, in which the right of riparian owners to drain into a natural water-course was maintained, but said: "This right is not, we conceive, an absolute right under all circumstances, irrespective of the size or the natural purpose which it subverts, to throw into it surface water, by means of ditches or drains, when by so doing it will be filled beyond its natural capacity, and overflow and flood the lands of a lower proprietor. The stream into which the sewage and water collected by the defendant found its way, was a mere rivulet of water, the outlet of springs at the head of the ravine. It may also, before the sewers were built, have received a portion of the surface water from the territory drained thereby. But at that time the surface water had no defined channel. It was subject to be disposed of according to the ordinary processes of nature. Absorption and evaporation would diminish the amount which otherwise might have found its way to the valley, and the discharge into the stream of the portion not otherwise disposed of, would naturally be gradual, and reach it at different points in its course."

The case of *Shane v. Kansas City Railroad Company*, 71 Mo. 237; 36 Am. Rep. 490, was one wherein the defendant had, by an embankment, obstructed the natural flow of surface water down a slough, and thereby injured the lands of the plaintiff on the Missouri river bottom. The court adopted the rules of the civil law, as stated in the principal case, and held the defendant liable. In the course of its opinion, the court reviewed the leading authorities on the subject; and they were further considered in a dissenting opinion by Judge Hough.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

NORTON v. PRESTON.

[15 MAINE, 14.]

PART PERFORMANCE OF A PAROL CONTRACT FOR THE SALE OF REAL ESTATE does not entitle either party to sustain an action at law for damages suffered from non-performance of the residue.

ASSUMPSIT. Plaintiff alleged that in consideration of his conveyance to defendant of certain realty, valued at five thousand six hundred and forty-eight dollars, defendant conveyed to him other realty valued at five thousand two hundred dollars, and agreed with plaintiff and A. H. Norton, in payment of the four hundred and forty-eight dollars remaining due plaintiff, to convey to plaintiff and Norton a certain store valued at two thousand five hundred dollars, on condition that Norton convey to defendant certain other real estate valued at two thousand and fifty-two dollars; that plaintiff and Norton had performed their agreements; that Norton had tendered a conveyance of the realty by him to be conveyed, and demanded the conveyance of the store; that defendant refused to receive the deed or to pay plaintiff the four hundred and forty-eight dollars. The evidence tending to prove these facts was rejected at the trial.

Allen and Tenney, for the plaintiff.

Boutelle and Wells, for the defendant.

By Court, **SHEPLEY, J.** It is important to understand what the testimony excluded would have proved, if it had been admitted. Upon examination, it is found to prove one entire contract for the exchange or conveyance of certain real estate described. There was no agreement for the payment of money;

no act was to be done beyond that of a conveyance of real estate from party to party. The case presented, is that of an agreement for the conveyance of real estate, not reduced to writing, but performed in part by each party, and a further performance refused by one of the parties; and the other party seeking in this action at law to recover damages for such refusal. The case does not therefore present the question decided in *Steele v. Adams*,¹ nor invite a re-examination of it. The contract proved, can be no other than a contract for the sale of real estate; and the act to prevent frauds and perjuries provides, that "no action shall hereafter be maintained upon any contract for the sale of lands," "unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party charged therewith, or some other person thereunto by him lawfully authorized."

It is contended, that as there was a part performance, the contract is taken out of the statute. It was said by Mr. Justice Buller, "that as it is settled in equity, that a part performance takes it out of the statute, the same rule shall hold at law:" *Brodie v. St. Paul*, 1 Ves. jun. 326. Lord Eldon comments upon this remark of Justice Buller, and shows, that according to their principles and modes of proceeding, the rule can not be the same at law and in equity: *Coolh v. Jackson*, 6 Ves. 12. And such has been the decision at law: *Rondeau v. Wyatt*, 2 H. Bl. 63. Kent, C. J., says, "there is such a dictum of Justice Buller while sitting in the court of chancery, but it has never been received as law:" *Jackson v. Pierce*, 2 Johns. 222.

The contract between the parties can not be enforced at law; and although this court has jurisdiction in equity, this is not a process in equity; and it would be improper to act upon it as such; because if the plaintiff has an equitable right it is a different one from that of having damages assessed by a jury for a breach of contract, and the defendant may also, in a proceeding in equity, set up a defense, which he could not at law.

Nonsuit confirmed.

ENFORCEMENT OF CONTRACTS BECAUSE OF PART PERFORMANCE, HAS NO EXISTENCE AT LAW.—The question of the specific enforcement of verbal contracts, which to be valid are required by the statute of frauds to be in writing, because there has been a part performance thereof, has several times been fully considered in this series: *Ives v. Gilbert*, 1 Am. Dec. 35, note; *Jackson v. Murray*, 17 Id. 58, note; *Townsend v. Houston*, 27 Id. 732. See also, *Wetmore v. White*, 2 Id. 323; *Ramsay v. Brailsford*, Id. 698; *Parkhurst v. Van Cortlandt*, 7 Id. 427, 442, note. This question has generally presented itself in cases where an application has been made to a court of

equity to complete the performance of such contracts in order to prevent one party from committing a fraud on another by means of such statutes. In the note to *Jackson v. Murray*, 17 Id. 58, the rule adopted by courts of equity is stated to be, that, "notwithstanding the statutory provisions mentioned (statute of frauds), courts of equity possess the power to enforce the specific performance of verbal contracts for the sale of land in cases of part performance of such contracts. Nothing, however, can be regarded as a part performance to take a verbal contract for the sale of land out of the operation of the statute, which does not place the party in a situation which is a fraud upon him unless the contract be executed. The statute of frauds was enacted for the purpose of preventing frauds, and not to encourage and sustain them, and when a party claims a right to a conveyance of land under a parol or verbal contract, on the ground of part performance, courts of equity will always grant the relief sought, provided the existence of the contract is established by clear and satisfactory proof and the acts of part performance are such that it would be fraudulent for the other party to ignore his agreement; and these acts of partial performance must be such as resulted from and would not have been done but for the particular parol agreement charged in the complaint or answer, as the case may be." Such is the rule adopted by courts of equity, and the same is now well settled by all the authorities: *Brown on the Statute of Frauds*, secs. 447 *et seq.*

Although recognized and followed in courts of equity, the rule is equally as well settled that a part execution of a verbal contract within the statute of frauds has no effect at law to take the case out of its provisions: *O'Hertiky v. Hedges*, 1 Sch. & Lef. 130; *Lane v. Shackford*, 5 N. H. 130; *Kidder v. Hunt*, 1 Pick. 328; 11 Am. Dec. 183; *Thompson v. Gould*, 20 Pick. 134; *Adam v. Townsend*, 1 Metc. 485; *Jacobs v. P. S. R. Co.*, 8 Cush. 224; *Thomas v. Dickinson*, 14 Barb. 90; *Abbott v. Draper*, 4 Denio, 53; *Jackson v. Pierce*, 2 Johns. 223; *Seymour v. Davis*, 2 Sandf. 246; *Davis v. Moore*, 9 Rich. (S. C.) 219; *Hunt v. Coe*, 15 Iowa, 197; *Eaton v. Whitaker*, 18 Conn. 231; *Johnson v. Hanson*, 6 Ala. 351; *Barickman v. Kuykendall*, 6 Blackf. 21; *Sailors v. Gambriel*, 1 Smith (Ind.), 82; *Payson v. West*, Walk. (Miss.) 515; *Hubbard v. Whitney*, 13 Vt. 21. An examination of the authorities cited will show, that although there has been a part performance of a parol contract within the statute of frauds, yet upon a failure to complete the same no action at law can be maintained upon the contract for damages for such breach. The reasons for this distinction between an action at law upon such a contract for damages, and the specific enforcement thereof by a court of equity, are well stated by the supreme court of Massachusetts in *Kidder v. Hunt*, 1 Pick. 331; S. C., 11 Am. Dec. 183. "The contract declared upon is admitted to be within the statute of frauds, since it relates to an interest in land, and is not in writing. It is provided by that statute that no action shall be maintained upon such a contract. But it is said, that as part performance of the contract by the plaintiff is averred, and as courts of chancery will decree a specific performance of a parol contract if there has been a part performance, as here, as we have no court of chancery with power to decree a special performance in such cases, the plaintiff may at least recover damages for the breach of such contract; and remarks to this effect are found in some of the opinions given in the cases decided by this court, and in England, but they are mere *obiter dicta*, and no case like the present has been decided in favor of supporting the action. In *Cooth v. Jackson*, 6 Ves. jun. 39, Lord Eldon doubts exceedingly the power of the courts of common law which is said to exist, and gives very strong reasons in support of his opinion. There are, no doubt, cases

proper for a court of chancery, such as those which relate to the execution of trusts, where the common law will give a remedy by an action for damages; and perhaps in the case of a parol contract respecting land, where the party has been put to expense as to his part of the contract under circumstances which would amount to fraud by the other party, case might lie for damages for the fraud, as was intimated in *Boyd v. Stone*, 11 Mass. 342; but this action is brought upon the contract itself, and to sustain it would be indirectly to give efficacy to a contract which the legislature says shall have none. It is on the ground of fraud only that the court of chancery undertakes to decree performance of such a contract." This case has been several times cited with approval in subsequent cases in Massachusetts: *Basford v. Pearson*, 9 Allen, 387; *Thompson v. Gould*, 20 Pick. 134; *Williams v. Bemis*, 108 Mass. 91; and *Dix v. Marcy*, 116 Id. 416; see also the remarks of Lord Eldon in *Cooth v. Jackson*, 6 Ves. jun. 38, 39. Mr. Justice Buller, in *Brodie v. St. Paul*, 1 Id. 333, stated the rule as to part performance to be the same at law as in equity. Thus he says: "As to the part performance; courts of law have lately adopted the same sort of reasoning, that prevails in this court: that there can be but one true construction upon the statute of frauds. Whatever it is, it ought to hold equally both in courts of law and of equity; and that as it is settled in equity that a part performance takes it out of the statute, the same rule shall hold at law." Notwithstanding such was the opinion of a learned judge, these remarks, whenever cited in subsequent cases, have ever been regarded as mere dicta, and the doctrine enunciated therein is stated by the reporter in a note to that case to have been exploded by the lord chancellor. So in *O'Herlihy v. Hedges*, 1 Sch. & Lef. 130, Mr. Justice Buller's opinion is stated to be wrong, and Lord Chancellor Redesdale says that he remembered that Mr. Justice Buller, upon being pressed with the consequences of that opinion in case of a demurrer to evidence, being obliged to abandon the position. Kent was also of the same opinion. "It seems never to have been decided in a court of law, that part performance of a parol agreement will take it out of the statute. There is such a dictum of Mr. Justice Buller, while sitting in the court of chancery, but it has never been received as law:" *Jackson v. Pierce*, 2 Johns. 223.

An examination of subsequent adjudications in Maine fails to show that the principal case has ever been overruled or even doubted in that state. It is cited by Brown, in his work on the statute of frauds, in the note to section 451, where it and a large number of other cases are cited in support of the rule above stated. In at least two other cases in that state, prior to the principal one however, the rule that the part execution of a verbal contract within the statute of frauds has no effect at law to take the case out of its provisions, has been recognized and adopted: *Freeport v. Bartol*, 3 Greenl. 344; *Patterson v. Cunningham*, 12 Me. 512. But if a contract void by the statute of frauds be not executory, but be fully executed, then a recovery may be had thereon. "If fulfilled and executed, they are just as valid as though they were in writing," according to the weight of American authority: *Lamar v. McNamee*, *post*, and *Jones v. Hardesty*, *post*; note to *Peter v. Compton*, 1 Sm. L. C., 7th Am. ed. 592. "The principle is the same when land is conveyed in consideration of a promise to convey other land in exchange; and although the promise can not be specifically enforced, the defendant may be compelled to make compensation for what he has received at the rate or value estimated by the parties:" Id. 589, citing *Basford v. Pearson*, 9 Allen, 387.

NORTON v. MARDEN.

[15 MAINE, 45.]

MONEY PAID UNDER A MISTAKE OF LAW, or voluntarily paid with a knowledge, or means of knowledge, of the facts, can not be recovered back.

MISTAKE OF FOREIGN LAW is regarded as a mistake of fact.

WHERE PARTIES CONTRACT UNDER A MUTUAL MISTAKE of the facts supposed to exist, there being no fraud and no beneficial interest obtained, the party who pays the money may recover it back; but if any benefit has been derived by such party, no recovery can be had.

ASSUMPSIT to recover the consideration paid by Norton to Marden, for the assignment of a bond for a lot of land in Bangor. Prior to the assignment the parties went upon a lot supposed to be the land described in the bond, and thereupon plaintiff paid for the land, and the defendant assigned him the bond. Subsequently it was discovered that the land seen by the parties was different from that described in the bond, and much more valuable. Plaintiff then offered defendant his bond, and demanded a repayment of the money, which was refused. At the trial, Shepley, J., charged the jury, that if the defendant showed plaintiff a different lot from that described in the bond, before the contract was made between them; and that it was made upon that erroneous information; and that if from the bond he was not undeceived, they should find for plaintiff, whether such erroneous information was given by the defendant fraudulently or through mistake, or want of information on his part; and if not so satisfied they should find for defendant. Verdict for plaintiff, and defendant excepted.

J. Appleton, for the defendant.

Kent, contra.

By Court, SHEPLEY, J. This is assumpsit for money had and received, brought to recover back a sum of money alleged to have been paid under a mistake. And the question presented by this bill of exceptions is, whether where parties contract under a mutual mistake of the facts supposed to exist, there being no fraud, and no beneficial interest obtained, the one who pays can recover back the money paid.

Certain principles in relation to this action seem now to be well settled. Money paid under a mistake of the law can not be reclaimed: Doug. 471;¹ *Bilbie v. Lumley*, 2 East, 469; *Stevens v. Lynch*, 12 Id. 38; *Brisbane v. Dacres*, 5 Taunt. 144; *Mowatt v. Wright*, 1 Wend. 355 [19 Am. Dec. 508]. But a mistake of

1. *Lowry v. Bourdieu*.

a foreign law is regarded as a mistake of a fact: 9 Pick. 112.¹ Nor can it be reclaimed, when voluntarily paid with a knowledge, or means of knowledge in hand, of the facts: *Martin v. Morgan*, 1 Brod. & B. 289; *Welsh v. Carter*, 1 Wend. 185 [19 Am. Dec. 473]. Nor where there may be a mistake of the facts, if the party paying has derived a substantial benefit from such payment; because he is not then entitled *ex æquo et bono* to reclaim it: *Taylor v. Hare*, 4 Bos. & Pul. 262. But when paid under a mistake of facts, and without any laches on the part of the payor, and without any substantial benefit derived from it, it may be recovered back: *Hern v. Nichols*, 1 Salk. 289; *Cox v. Prentice*, 3 Mau. & Sel. 344; *Milnes v. Duncan*, 6 Barn. & Cress. 671; *Garland v. Salem Bank*, 9 Mass. 408 [6 Am. Dec. 86].

In *Mowatt v. Wright*, it is said, that an error of fact takes place, either when some fact which really exists is unknown, or some fact is supposed to exist, which really does not exist. And that, "the cases founded on mistake seem to rest on this principle, that if parties, believing that a certain state of things exists, come to an agreement with such belief for a basis, on discovering their mutual error, they are remitted to their original rights." In *Cox v. Prentice*, Lord Ellenborough says: "Now this is a case of mutual innocence and equal error, which is not an unusual case for money had and received."

In the case now under consideration the instructions required, that the jury should find, that there was a mistake of fact, viz., that the plaintiff supposed that he was purchasing a bond for a different lot from the one described in it; and that they should also find, that the contract was made upon that mistake of facts. But it is insisted, that the plaintiff had the means of correct knowledge. And in one sense a person may be said always to have the means of knowledge. He may have access to books, and to the assistance and instructions of his fellow men. But the means of knowledge which the law requires are such, as the party may avail himself of as then present without calling to his aid other assistance. And in this case there is no ground for inferring, that the plaintiff had then the means of knowing that the true lot designated in the bond was not the one examined. He does not appear to have had any more satisfactory means of knowledge, than the statements of the defendant, and those proved to be erroneous.

It is also insisted, that the case is within the principle of the decisions of this court, that the party who takes a deed of release

1. *Haven v. Foster*; 8. C., 19 Am. Dec. 253.

of real estate, if he obtain thereby no title, can not recover back the money paid. Both parties, in such cases, must be supposed to understand the tract of land purporting to be conveyed. And the absence of all covenants of title is satisfactory evidence, that they knew that the title was doubtful, and that the contract was made upon that basis. If, in such cases, there is any mistake, it is rather a mistake of law, than of fact. But the substance of the contract is, that the party purchasing agrees to purchase the other's right, whatever it may be, and take the risk of the title upon himself. And in such cases, there is no principle of law, which authorizes him to reclaim the purchase money in case of an entire failure of title. This is not the case of a conveyance of real estate, but the assignment of a contract for a conveyance, and the contract of assignment made upon a mistake of facts. And there is no evidence that the plaintiff obtained any benefit from it.

Exceptions overruled, and judgment on the verdict.

MISTAKE, RELIEF IN EQUITY AGAINST.—When, owing to a mistake, a writing has been drawn contrary to the intent of the parties, whether relief will be granted in equity, see *Chapman v. Allen*, 1 Am. Dec. 24; *Parsons v. Hosmer*, Id. 58; *Somerville v. Trueman*, Id. 389; *Coger v. McGee*, 5 Id. 610; *Gillespie v. Moon*, 7 Id. 559; *Smith v. Allen*, 21 Id. 33; *Chamberlain v. Thompson*, 26 Id. 390. Such relief is not usually granted against ignorance or mistake of law: *Fisher v. May*, 5 Id. 626; *Storrs v. Barker*, 10 Id. 316, and note. In the case of *Lawrence v. Beaubien*, 23 Id. 155, a distinction was made between a mistake of law and ignorance of law, and it was held that a contract made under a mistake of law would be relieved against. In the note to that case the authorities recognizing this distinction and those repudiating it are adverted to and commented upon: See *Champlin v. Laytin*, 18 Wend. 407; S. C., 31 Am. Dec. 382, and the note thereto.

BANISTER v. HIGGINSON ET AL.

[15 MAINE, 73.]

AN OFFICER'S RETURN OF A LEVY upon land, which does not show by whom the appraisers were appointed, is void, and no title passes by a sale in pursuance of such levy.

PAROL EVIDENCE IS NOT ADMISSIBLE to show that such appraisers were appointed as required by law.

AMENDMENT OF SUCH RETURN by showing by whom the appraisers were appointed will not be permitted if the rights of third persons will be affected thereby.

WHERE THE RETURN OF AN OFFICER of a levy upon and sale of land is defective, no presumption arises from the lapse of sixteen years that the statutory requirements were complied with.

JUDGMENT OF A COURT HAVING JURISDICTION of a cause is not the subject of a collateral attack, although erroneous, but is valid and effective until reversed.

RETURN OF AN OFFICER showing that he has attached land "supposed" to belong to the debtor, does not impair the effect of the attachment, if the land in fact is the property of the debtor.

ACTION to recover a tract of land in Bangor. The writ was dated October 18, 1835, and plaintiff relied upon the seisin of Moses Brown, her grandfather, within twenty-five years. It was admitted that plaintiff was his sole heir; that on November 17, 1807, one Samuel Greenleaf owned the *locus in quo*, and that on that day he conveyed a part of the land to Brown; that on May 1, 1805, Stephen Higginson, jun., and Henry Higginson, having a demand against Greenleaf, attached the demanded premises, and judgment being rendered in their favor, an execution was levied thereon by one Balch, a deputy sheriff. The return of Balch did not show by whom the appraisers, required by the statute in such proceedings, were appointed. A motion was made to amend the return so as to show this fact, and certain depositions offered to prove the same. This testimony, if legally admissible, was to be considered a part of the case. On December 23, 1822, Moses Brown commenced an action against Greenleaf, issued an attachment, and levied upon the disputed premises, the officer returning the writ as levied upon such premises, "supposed to be the property of said Greenleaf." Subsequently a judgment by default was rendered, and an execution issued, which was extended upon such premises. This levy was in legal form, and it was agreed that the tenants were the legal representatives of the Higginsons, and that each party might take all legal exceptions to the above evidence. If the action was maintainable the defendants were to be defaulted, otherwise a nonsuit was to be entered.

Mellen and Abbott, for the demandants.

F. Allen, for the tenants.

By Court, *WESTON, C. J.* The levy made in July, 1807, upon the demanded premises, in behalf of the tenants, is very clearly bad, it nowhere appearing, either in the return of the officer, or the accompanying documents, that the appraisers were appointed in conformity with the statute. The requirements of the law upon this point are too important to be disregarded; and there being no legal evidence of a statute transfer of title from the debtor to the creditors, the fee remained in the former unaffected by the levy.

Parol proof has been offered, that the appraisers were appointed according to law, and a motion has been submitted, in behalf of the tenants, that the officer may be permitted to amend his return, in conformity to what is alleged to be the truth of the case. Without adverting to the danger of such a course in any case, after thirty years, in regard to facts resting in memory, we are of opinion, that it can not be permitted, with a view to affect third persons. The propriety of such an amendment was fully considered in the case of *Means et al. v. Osgood*, 7 Greenl. 146. It was there stated, that it could not be allowed to affect any other persons than the original parties. It has even been held that the interest of third persons could not be affected, where the amendment was allowed and made by leave of court: *Emerson v. Upton*, 9 Pick. 167. And we are of opinion, that the parol proof can not be received to sustain the levy, and that the officer can not be permitted to make the amendment proposed. It has been insisted, that it is too late to take this objection, after the lapse of so many years. To this we think it is a sufficient answer, that if presumptions, inconsistent with the record of a levy, could be allowed in any case to sustain it, they could not arise in the period of little more than sixteen years, which intervened between the conflicting levies in the case before us.

If the title of the tenants is fatally defective, it remains to determine whether an equal infirmity does not attach to that of the demandant; for unless her title has been sustained, she can not have judgment. It is based upon the seisin of her ancestor, derived from a levy of the demanded premises in August, 1823. No objection has been taken to this levy, in point of form; but it is urged that the tenants have a right to treat as a nullity the judgment upon which the execution of the levying creditor issued. But we are of opinion, that it was rendered by a court having by law jurisdiction of the cause; and that it can not be impeached collaterally, but remains in force until reversed. We are not, in this case, called upon to determine the force and effect of the judgment of another state, which was elaborately discussed in *Hall et al. v. Williams*, 1 Fairf. 278.

The debtor, having had his residence in this state, had removed therefrom, and had established his domicile elsewhere. But he left estate liable to be attached, of which he was not divested by the defective levy of the tenants. This estate the ancestor of the demandant attached. The officer, in his return, sets forth the attachment of the land in controversy, "supposed" to be the property of the defendant. The lien of the creditor, or the

title of the debtor, was not impaired by the use of this qualifying term. It was a case then within the first section of the act regulating judicial process and proceedings. Stat. of 1821, c. 59. It is there provided, that if the goods or estate of a defendant out of the state are attached, "the officer shall return the writ, with his doings thereon; and such action being duly entered, the court may order such notice to the defendant, as justice may require." It appears, therefore, that the action was duly entered, and subject to the jurisdiction, direction, and control of the court. If in the subsequent exercise of this jurisdiction, they departed from the requirements of the same statute, so that there is manifest error upon the record, the law affords an appropriate remedy; but as in other cases, where error arises in the progress of a cause, the judgment remains in force, until reversed.

As to that part of the premises, which Greenleaf, the owner, conveyed by deed to the ancestor of the demandant in 1807, there can be no doubt that his title passed by that deed; as the grantor was then in the actual possession. Upon the facts agreed, the opinion of the court is, that the demandant is entitled to judgment.

O'BRIEN ET AL. v. ELLIOT.

[15 MAINE, 125.]

ANSWER TO A BILL IN EQUITY that is unsupported by proof, and not responsive to the bill, but setting up matters in avoidance, must be considered as untrue and out of the case.

DOWER IS A LEGAL RIGHT, and it can not be regarded as fraudulent to claim it at law, unless there has been some forfeiture, release, bar, or satisfaction, which can not be proved at law, but which may be established in equity.

AN EQUIVALENT, TO BE A SATISFACTION of dower, in equity, must be designed and accepted in lieu thereof.

DOWER IS NOT BARRED IN EQUITY by a creditor levying upon the land of his debtor, and, after the right to redeem has expired, selling it with warranty, and paying the excess of the money received over his debt to the widow and children of the debtor.

BILL in equity. The facts are stated in the opinion.

Mellen and R. K. Porter, for the plaintiffs.

Lowell, for the defendant.

By Court SHEPLEY, J. The bill sets forth, that the plaintiffs are the heirs at law and devisees of Gideon O'Brien, deceased; that said Gideon during his life-time was seised of a certain

message by virtue of the extent of an execution upon the same as the property of Daniel Elliot, the late husband of the defendant; that Elliot during his life, and after the right of redemption had expired, paid the debt; and that O'Brien was willing to convey to Elliot on request, but never did so convey during the life of Elliot. That on the fifteenth of June, 1820, O'Brien conveyed the premises by deed of warranty to John Stuart, for the consideration of five hundred dollars, being the full value, and received in payment a conveyance of a house and lot in Machias, valued at two hundred dollars, and three hundred dollars in money; that he paid to said Daniel during his life one hundred dollars, and after his death about twelve years ago he paid to the defendant, for the use of herself and children, two hundred dollars, and at her request conveyed to Betsey Elliot, their daughter, the house and lot received of Stuart in part payment; and that these payments were made on account of the sale of the message to Stuart, and that no consideration was paid to him by Betsey Elliot for the house and lot; and that defendant accepted these payments and the conveyance to her daughter as the full value of the message. That since the death of said Gideon, she has commenced her suit against said Stuart to recover her dower in the message conveyed by warranty to him, which suit is still pending at law; and that after having received and accepted full satisfaction for the estate as a discharge of said O'Brien, she is now fraudulently prosecuting her suit to obtain dower in the same premises. It alleges that the plaintiffs being liable to Stuart on the warranty have taken upon themselves the defense of that suit; and that these facts not constituting a bar at common law, the bill is filed; and it concludes with a prayer for an injunction to stay all further proceedings at law.

The answer, which is very defective, and badly drawn, and, as it is said, without the advice of counsel, admits the sale from O'Brien to Stuart by the consent of her husband for five hundred dollars, denies any knowledge of the payment of one hundred dollars to the husband during his life, and while it admits the conveyance of the house and lot to the daughter, denies it was by her request; admits that she received of O'Brien at different times two hundred dollars, and says that she is fully satisfied with the amount paid by the said O'Brien, so far as it relates to the land and dwelling-house, but the said Mary says, that a store belonged to the premises of the said Daniel worth two hundred dollars, for which the said Gideon received rent

for many years, and was finally sold by the heirs of the said Gideon without her consent, or any consideration received by her.

It appears from the testimony, that the store referred to in the answer was a small one-story building of little value, and although built by Elliot, did not stand upon the land sold by O'Brien to Stuart; and so much of the answer as alleges it to have belonged to those premises is fully disproved, and the remaining part of the answer relating to it is not supported by any proof, and not being responsive to the bill, but set up in avoidance, it must be regarded as untrue and out of the case: *Briggs v. Penniman*, 8 Cow. 387 [18 Am. Dec. 454].

As the right of dower is a clear legal right, it can not be regarded as fraudulent to claim it at law, unless there has been some forfeiture, release, bar, or satisfaction, which can not be proved at law, but which may be established in equity. The bill proceeds upon the ground of a satisfaction by payment of the whole value of the land, and of an equivalent for dower to the defendant. Lord Coke says, that a jointure or estate made to the wife in satisfaction of dower, is no bar at the common law, although dower *ad ostium ecclesie* or *ex assensu patris* might be, "for a right or title that one hath to a freehold can not be barred by acceptance of a collateral satisfaction:" Co. Lit. 36 b. Mr. Hargrave, in note 224 upon this, says, that acceptance of a term of years, or a sum of money in lieu of dower is a good bar in equity. Lord Eldon says, that the idea that there must be a legal bar, prevailed till *Lawrence v. Lawrence*, 2 Vern. 265.¹ Now equitable bars are in daily practice: *Mundy v. Mundy*, 2 Ves. 129. But to be a satisfaction in equity it must be designed and accepted in lieu of, or as an equivalent for dower: *Couch v. Stratton*, 4 Ves. 391; *Larrabee et ux. v. Van Alstine*, 1 Johns. Ch. 307 [3 Am. Dec. 333]; *Adsit v. Adsit*, 2 Id. 448 [7 Am. Dec. 539]; *Swaine v. Perine*, 5 Id. 483 [9 Am. Dec. 318]; *Jones v. Powell*, 6 Id. 194.

Where real estate was sold in which a widow was entitled to dower, and the administrator, by her consent and with her knowledge stated in the terms of sale, that a clear title would be given, and a full price for the land was paid without any disclosure by the widow of a claim to dower, it was held that she committed a fraud upon the purchaser, which precluded her from afterward setting up a title to dower: *Dougrey v. Fopping*, 4 Paige, 94.

1. 2 Vern. 265.

In this case there is no allegation in the bill, that the money paid was in lieu of, or as an equivalent for, or in satisfaction of dower. Nor any allegation of an agreement not to claim it, or that she so received the money paid. Nor is there any proof of the kind, unless it is to be derived from her answer. That does say, she is fully satisfied so far as it relates to the land and dwelling-house which are the only subjects of controversy; but this is not said in answer to a bill charging that it was received as compensation for or in satisfaction of dower. If it had been it might have been sufficient. As it now stands, it may be fairly understood as having been said in consequence of her sense of having received all that was payable to her and her children on account of the land sold to Stuart. From the nature of the transactions, as stated in the bill and answer, it can not be inferred, that the payments were made in satisfaction of dower. They would rather seem to have been made by O'Brien, under a belief that she was not entitled to dower, as it is not probable, that he would have conveyed with warranty if such had not been his impression. If she by her acts or declarations had induced the belief, that she had no claim to dower, and the sale had been made and payment received under that belief so produced, she might have been precluded upon the principle of the case of *Dougrey v. Fopping*, from asserting her claim; but the case is without any such allegations or proofs.

The case seems to amount to this only, that O'Brien holding land in trust for Elliot in which his wife had a contingent right of dower, sells with warranty, before the death of the husband, disregarding or overlooking her right, and pays the whole proceeds over after the right has become certain, without retaining anything to compensate him for his responsibility upon the warranty. His heirs may now suffer from such a misapprehension of right, or neglect in taking security; and the defendant may in consequence have received more for herself and children, than she otherwise would have done; but if so, all these facts do not constitute an equitable bar.

Bill dismissed, with costs for defendant.

DOWER, BAR OF, BY ACCEPTANCE OF LEGACY: See *Gordon v. Stevens*, 27 Am. Dec. 445, 448, note; *English v. English*, 29 Id. 730.

WIDOW'S RIGHT TO DOWER, WHEN AND HOW BARRED: *Poptis v. Bumstead*, 5 Am. Dec. 113; *Catlin v. Ware*, 6 Id. 57.

RECOVERY AT LAW, BY WIDOW, OF DOWER, does not preclude her from afterwards recovering the rents and profits in equity: *Sellman v. Bowen*, 29 Am. Dec. 524.

KENDALL ET AL. v. GALVIN.

[15 MAINE, 131.]

ACCEPTANCE OF BILL OF EXCHANGE by the drawee, is presumptive evidence that the latter has effects of the drawer in his hands.

WRITTEN ORDER, DATED AND SIGNED, directing one person to pay to another a specified sum, and to charge the same to account of drawer, is a bill of exchange, although it is neither made payable to order or bearer, nor contains the words value received, nor is made payable on a day certain, nor at any particular place.

ACCEPTOR OF A BILL OF EXCHANGE in order to recover from the drawer the amount thereof after payment, must overcome the presumption arising from the acceptance that he has effects of the drawer in his hands.

ASSUMPSIT for an account paid to N. K. Seaton on the defendant's order. The plaintiffs offered in evidence the following order: "Messrs. Kendall and Kingsbury, Gents: Please pay N. K. Seaton four hundred and fifty-five dollars, thirty-six cents, and charge the same to my account. Calais, June 7, 1830. Geo. I. Galvin." The plaintiffs also proved by Seaton the acceptance and payment of the order. The defendant requested the court to instruct the jury that the acceptance and payment of the order by the plaintiffs were *prima facie* evidence of funds of the defendant in their hands, and that it was incumbent on them to rebut that presumption to entitle them to recover. The court refused such instruction, and told the jury that plaintiffs were not bound to show that they had no funds of the defendant in their hands to entitle them to recover, and defendant excepted. Verdict for plaintiff.

J. Granger, for the defendant.

Downes, contra.

By Court, **SHEPLEY, J.** The acceptance of a bill of exchange by the drawee is presumptive evidence, that he had effects of the drawer in his hands. It is so stated by the elementary writers upon bills, and the authorities authorize it: 2 Stark. Ev. 167, 168; *Vere v. Lewis*, 3 T. R. 183. Whether the instructions given were correct must depend therefore upon the instrument offered in evidence by the plaintiffs. If it is to be regarded as a bill of exchange, the instructions were erroneous, because no testimony was offered to rebut this presumption at law. If it can be regarded as an order or request to pay money, and not a bill of exchange, and so not within the rule applicable to them, then the instructions were correct.

No precise form of words is necessary in a bill of exchange:

Morris v. Lee, 2 Ld. Raym. 1396. There are certain essential requisites; such as, that it be payable at all events, not on a contingency, not out of a particular fund, that it be for the payment of money only, and that it exhibit so clearly the drawer, drawee, and amount, that these can be known to strangers into whose hands it may come.

The plaintiff's counsel contends, that the instrument in this case is defective in several particulars, and that it should not be regarded as a bill of exchange.

1. That it is not made payable to order or bearer. It is well settled, however, that the words order or bearer are not essential: Bayl. 29; Ld. Raym. 1545;¹ 6 T. R. 123;² 9 Johns. 217.³

2. That it has not the words value received. These words are not regarded as essential: Bayl. 33; Ld. Raym. 1481;⁴ 8 Mod. 267.⁵

3. It is not payable at a day certain, or at any usance or time after date. It has been decided, that it is not necessary to constitute it a bill of exchange, that it should be. In the case of *Boehm v. Sterling*, 7 T. R. 419,⁶ the writing declared on was in these words:

“BARTHOLOMEW LANE, London, 17 February, 1796.

“Messrs. Down, Thornton, Free, and Cromwell, pay to Mr. Dobson or bearer, 2444£ 14s. STERLING, HUNTERS & Co.”

Lord Kenyon says, “at the time of the trial, I thought there was a difference between banker's checks and bills of exchange; and that the rule adopted with regard to the latter did not apply to the former; but on further consideration, I do not think that that distinction is well founded.” It was held to be a bill of exchange and to be properly declared on as such.

4. It is not payable at any particular place or addressed to the drawee stating his residence. In the case of *Shuttleworth v. Stephens*,⁷ 1 Camp. 407, the instrument declared on was in these words: “21st October, 1804. Two months after date pay to the order of John Jenkins, 78£ 11s., value received. Thos. Stephens.” No place of payment or place of residence of any party is stated in this case or in the case of *Boehm v. Sterling*, yet they were held to be properly declared on as bills. A request to pay the amount of a note written underneath it, has been held to be a bill of exchange: *Leonard v. Mason*, 1 Wend. 522. The instrument in evidence in this case might have been declared on

1. *Burchell v. Slocock*.

3. *Goshen T. Co. v. Hurtin*; 8 C., 6 Am. Dec. 273.

5. *Jenny v. Heale*.

2. *Smith v. Kendall*.

4. *Mackleod v. Snee*.

7. *Shuttleworth v. Stephens*.

6. 7 T. R. 423.

as a bill of exchange; and if so, and a recovery could have been had, then the rule of law respecting bills applied to it, although not declared on as such; for the law applicable to it can not be different on account of the different manner in which it is presented in evidence.

It would seem, that requests, or orders, payable out of a particular fund, or upon a contingency, or not payable in money only, or which are liable to any other objection preventing them from being regarded as bills of exchange, do not come under the rule of law, that acceptance is *prima facie* evidence of effects of the drawer in hand: *Weston v. Penniman*, 1 Mason, 306. To enable the plaintiff to maintain this suit, he must rebut the *prima facie* evidence arising from his acceptance.

Exceptions sustained, and new trial granted.

OWEN v. BOYLE.

[15 Maine, 147.]

PRINTED VOLUME OF THE LAWS of a foreign country, proved by witnesses to have received the sanction of the executive and judicial officers of such country, as containing its laws, is admissible in evidence in a case where the title to property situated within that country is in question.

UNWRITTEN FOREIGN LAW is to be proved as a fact.

COURTS WILL NOT PRESUME WITHOUT EVIDENCE that the common law of England is also the common law of her colonies.

COURTS OF THIS COUNTRY TAKE NOTICE of the common law of England without proof; not, however, because it is the common law of a foreign country, but because it has become a law to us, and we look to it, without proof, as to our own law.

COURTS OF THIS STATE will not presume without evidence that all property placed upon the land of another in a foreign country, is liable to distress for rent in arrear, because there are many exceptions to such rule in favor of trade and commerce.

CERTIFICATE THAT A CERTAIN FACT APPEARS OF RECORD, without producing an authenticated copy of the record, is no evidence of the existence of the fact.

REPLEVIN, by Owen against Boyle, for six hundred bushels of salt, which had been placed in a store on the island of Campo Bello, in the province of New Brunswick. At the trial a volume of the statutes of the province was introduced in evidence against the defendant's objection; also a certificate to prove the appointment of the constable, as follows: "Charlotte to wit. I hereby certify unto all whom it may concern, that James M. Parker was duly appointed at the general sessions of the peace,

holden at Saint Andrews, in and for the county of Charlotte, on the second Tuesday in April, 1835, one of the constables for the parish of Campo Bello in the said county, as it appears from a record of the same, remaining on file in the office of the clerk of the peace of said county, dated this twenty-first June, 1836. H. Hatch, clerk of the peace for the county of Charlotte, province of New Brunswick." The warrant of distress referred to in the opinion, was as follows: "To Isaac B. Mather, our bailiff, greeting:—Distrain the goods and chattels of William McLane on the premises in his possession, situate in the parish of Campo Bello, for fifty-six pounds and fifteen shillings, being rent due to us for the same at the first day of May last, and for your so doing this shall be your sufficient warrant and authority. September 21, 1835." The other facts are stated in the opinion. The verdict was for the plaintiff.

F. Allen and Hobbs, for the defendant.

Millen and S. S. Rawson, *contra*.

By Court, SHEPLEY, J. The defendant was the owner of the property replevied, and still is the owner, unless the right of property has been changed by the proceedings in the province of New Brunswick. He has a right to insist that the plaintiff shall show, that by the laws and proceedings there, he acquired a right to the property. Yet if such facts are shown, and the laws applicable to them, as prove a change of property there, the defendant when he voluntarily places his property under the protection or control of foreign laws, can not justly complain, that by their operation his property is taken from him without any compensation, to pay the debts of another. The plaintiff claims as the purchaser of the property at an auction sale, alleging that it had been lawfully seized under a warrant of distress, for the payment of the rent of a store on the island of Campo Bello, in the county of Charlotte, due from William McLane to him. To prove that he was the owner of the estate occupied by McLane, the plaintiff read a deed of indenture between himself and others bearing date on the sixteenth day of April, 1835, which was objected to, as not legally proved. The proof was made by the testimony of the subscribing witnesses before the lord mayor of London, and is by him certified under his official signature and seal of office. Such an authentication would be sufficient to authorize the deed to be read as evidence of title, by the laws of that province, if they are properly proved in the case. And as the estate is situated in that

province, if it is sufficient to pass the title there, it should be so regarded here.

Were the written or statute laws of that province legally proved and admitted? The general rule is, that foreign laws are to be proved as a matter of fact; and the mode of proof of the written law is to be, by the production of a duly authenticated copy. An exception to the rule respecting the mode of proof, has been allowed in the courts of the United States and in those of several of the states, by receiving the printed volumes of the laws of the states of the union, as *prima facie* evidence. But in 3 Pick. 293¹, the court say, that they "do not mean to decide, that the law of any country merely foreign may be so proved." Another exception may be said to be established by the case of *Talbot v. Seeman*, 1 Cranch, 38, allowing foreign laws, which have been promulgated as such by our own government, to be read without other proof. The only case at common law, noticed, allowing a printed volume to be read as evidence of a foreign law, is the case of *Lacon v. Higgins*, 3 Stark. 178. In that case the French vice-consul, being called as a witness, produced a book, which he stated contained the French code of laws upon which he acted at his office; that there was an office called the royal printing-office, where the laws were printed by the authority of the French government; the book purported to have been printed at that office; and the witness stated, that the book would have been acted upon in any of the French courts. Upon this testimony Chief Justice Abbott admitted the book to be read as proof of the law, and seemed to rely upon the case of the *King v. Picton*, 30 Howell's State Trials, 514. In this latter case the objection to the book of Spanish laws is said to have been waived.

In the present case the books admitted purported to contain the laws of the province, and to have been printed by the printer to his majesty, and it was proved, that the laws thus printed, were distributed by the government to its officers, and that they had been cited and read in the courts there as laws in force, and as regulating the administration of justice. These books have received the sanction of the executive and judicial officers of the province as containing its laws; and this is proved upon the oath of witnesses. It is difficult to say, that it is not as satisfactory to the mind as the exemplification of a roll found in the possession of the *custos rotulorum* would be, accompanied by the oath of the person making it. It can hardly be said to be a departure from the rule requiring the best evidence; because the pres-

1. *Raynham v. Canton*.

ent proof does afford evidence, that, if these books were offered in the courts of the province where the estate is situated, the laws, which they contain, would be allowed to operate upon that estate. And this is the very object to be attained; to allow them the same efficiency, which they would have where the estate is situated. And that is all that can reasonably be required, where the *lex rei sitæ* governs the case.

The laws being admitted, what is their influence upon the case? They authorize the deed to be read, which proves the title of the plaintiff. They also prove the mode of proceeding "when any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract whatsoever:" Province Laws, 50 Geo. III., c. 21, sec. 4. And the seventh section provides, that the distress shall not be deemed unlawful for any irregularity in the proceedings. But the laws do not provide when a distress for rent may be lawfully made, or what, or whose, property may be lawfully taken. Nor is there any proof introduced into the case, in any mode to ascertain these most important matters. It is said in argument, that the common law of England prevails in that province. But can that be assumed by this court without any proof? The unwritten foreign law is to be proved as a fact; and the English courts will not presume that the law of Scotland agrees with that of England upon any particular point: 2 Stark. Ev. 331. It is true, that Chief Justice Abbott held, in *Brown v. Gracey*, Dow & Ry. N. P. Cas. 38,¹ that where the defendant would set up a defense to a promissory note by the laws of Scotland, not apparent by the laws of England, he must show it; but such a rule can not be applied in this case, because the plaintiff is obliged to prove his right to distrain the defendant's property as a part of his title, which it is incumbent upon him to make out. Starkie says, the statement of text writers may be admitted to prove, whether the law of the mother country be the law of the colony: 1 Stark. Ev. 249; but still the proof must be introduced by the exhibition of such text writers.

The usual course is to make the proof by competent witnesses learned in those laws: Story Conf. L., c. 17, sec. 642. Blackstone says, it has been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being are immediately there in force; but this, he says, must be understood with many and great restrictions. And speaking of the American plantations generally, he says, "the

1. See Dow & Ry. N. P. Cas. 41.

common law of England, as such, has no allowance or authority there:" 1 Com. 107. This language may be thought to need many restrictions, as well as the doctrine commented upon by him; but it is sufficient to prove, that it would be quite rash for a court here to presume, that all the common law of England was in force in her colonies.

We are in the habit of taking notice of the common law of England without proof; not however because it is the common law of a foreign country, but because that common law has become a law to us, and we look to it without proof, as to our own law. Nor can this be regarded as a technical difficulty, for it is very possible to conceive, when the plaintiff is required to establish by proof his right by the laws of the province to take the defendant's property, as then situated, for the rent due from McLane, that this may prove to be a matter, entering vitally into the merits of the case. The statement of the report is, that the defendant had placed his property in that store, but under what circumstances, or for what purposes, does not appear.

There are many and important exceptions to the general law of distress, made in favor of trade and commerce. In a case in which the whole doctrine was much examined, it was decided, that goods of the principal in the hands of his factor were not liable to be distrained for the factor's rent: *Gilman v. Elton*, 3 Brod. & Bing. 75. For like reasons, it has been held, that property deposited by a broker, in a warehouse upon a wharf for safe custody, to wait an opportunity to sell, was not liable to be distrained for rent due from the wharfinger: *Thompson v. Mashiter*, 1 Bing. 283. And the same rule of exemption has been decided to apply to goods in a common warehouse: *Matthias v. Mesnard*, 2 Car. & P. 353. This is not the proper occasion to examine into the extent of the exemption in favor of trade and commerce further than to show, that it may be important to a just decision of the rights of these parties, that the law should be proved by those who are competent to speak with a full knowledge of it. It is said, however, that the title of the plaintiff can not be drawn into question for want of proof of the legal right to distrain. As that matter, although argued at the bar, does not properly arise out of the report, the decision is not placed upon it.

The certificate of the appointment of the constable was objected to. It does not purport to be an attested copy of the record, while it states the existence of one. A record or public

document is made evidence in such a case, by the production of a copy proved by the oath of the person comparing it; or by an office copy attested and duly authenticated. The certificate can not be regarded as legal evidence: 1 Stark. Ev. 188, 191, Metcalf's ed.

Verdict set aside, and new trial granted.

LAW OF ANOTHER STATE MUST BE PROVED as facts, otherwise they will be presumed to be in accordance with the common law: *Holmes v. Broughton*, 25 Am. Dec. 539, note. See, also, the note to *State v. Twitty*, 11 Id. 780, for a full discussion of this subject.

FOREIGN LAWS, HOW PROVED.—It was decided, in *Dougherty v. Snyder*, 16 Am. Dec. 520, that the unwritten law of a foreign country may be proved by the testimony of persons learned in the laws of such country, and that foreign laws, if not shown to be in writing, may be so proved. See *State v. Twitty*, 11 Id. 784; *Brackett v. Norton*, 10 Id. 179. Foreign laws, if written, must be produced in evidence; if unwritten, they may be proved by the testimony of disinterested and intelligent witnesses: *Woodbridge v. Austin*, 4 Id. 740; *Kenny v. Clarkson*, 3 Id. 336. In *Newsom v. Adams*, 22 Id. 126, it was held that parol evidence of the *lex non scripta* of a foreign country must be received, without requiring the party offering it to show that there is no statute law on the subject.

MONROE v. CONNER ET AL.

[15 MAINE, 178.]

ONE PARTNER IS NOT BOUND BY A CONTRACT entered into by his copartner, after giving actual notice to the party proposing to make it that he will not be bound thereby, although the fruits of the contract have been enjoyed by the partnership, of which he is a member.

ASSUMPSIT against James Conner and William Coleman. The former lived at Gardiner, and owned a carding and fulling mill at Unity. The business was carried on by Coleman, and the articles charged were furnished by plaintiff, and delivered at the mill. Plaintiff claimed to recover against both defendants on the ground that they were partners in the business carried on at the mill. No articles of partnership were produced, but other evidence was introduced tending to prove the partnership. Conner denied the partnership, and offered evidence to show that he had given notice to the plaintiff that he would not be bound by any contracts made by Coleman. The court was asked to instruct the jury, "that if Conner notified the plaintiff's agent who delivered all the articles, before the delivery, that he, Conner, would not be holden for anything, unless delivered by his order, that Conner is not holden for anything delivered to

Coleman after such notice." This instruction was refused, and the court instructed the jury, that if the defendants were copartners, such notice would not discharge Conner from further liabilities, unless he should show that by the conditions of the copartnership, such power was reserved to Conner. The jury were requested to find whether such notice was or was not given. The jury found for plaintiff, and also found that such notice was given. Conner filed exceptions.

Evans, for Conner.

W. G. Crosby, for the plaintiff.

By Court, SHEPLEY, J. The question presented in this bill of exceptions is one of no inconsiderable importance in a mercantile community, and there is found to be some difference of opinion respecting it. The general rule is, that the contract of one partner binds all, in transactions relating to the partnership; and this rule prevails when the partner making the contract applies the fruits of it to his own private use, if the contract is made in the usual course of business, and the appropriation be unknown to the other party to the contract. So one partner can make purchases, and can sell, pledge, and assign the partnership goods; and in these acts bind all the partners.

When a partnership becomes known, and its course of dealing has been established, all are at liberty to regard one as acting for the benefit of all the partners in this accustomed course of dealing. If it were not so, there could be no safety in commercial contracts of this character. But the right of one partner to bind all rests upon the principle, that all have agreed that he should do so.

This agreement is either expressed or implied by law from the nature of the association, or from the customary course of dealing. There is nothing inconsistent with this rule in allowing one of the partners to dissolve the contract of partnership, giving due notice that such power to bind him has ceased to exist. This he may, without doubt, do, where there is no special agreement, that the partnership shall continue for a definite period, which is yet unexpired. Whether one partner may dissolve the partnership before the agreed time expires, may admit of doubt. Upon principle, however, it would seem that it was only for the other party to that contract to complain, it being of no importance to others whether they violate contracts between themselves, if full notice is given, so that others may understand to whom they are to give credit. Kent evidently inclines to the

opinion, that the dissolution may take place: 3 Com. 54. And such is the law in New York: 17 Johns. 525;¹ 19 Id. 538;² while the law would appear to be different in England: 16 Ves. 56;³ 1 Swans. 495.⁴ It does not, however, become necessary to express any opinion upon this point, as there is no proof in the present case that the partnership was formed for any definite period. In such cases it is admitted, that one partner may by notice dissolve; and thus prevent those having such notice from making further contracts to bind the partnership. If such a power exist as to all persons, it would be difficult to deny that one partner could protect himself against a particular contract by actual notice that he dissented from it before it was concluded. Such a notice removes the foundation upon which the right rests, to charge all the partners upon the contract of one. It leaves no longer the presumption, that one acts for all, by the consent of all. And if, after such actual notice, a person will give credit, he can not reasonably complain that he can not obtain payment from him, who has notified him not to give the credit.

The only difficulty arises in relieving the partner giving such notice from the payment, when the fruits of the contract have been enjoyed by the partnership of which he still continues to be a member. In *Willis v. Dyson*, 1 Stark. 164, Lord Ellenborough held, that "it would be necessary for the party sending goods after such notice, to prove some act of adoption by the partner who gave the notice, or that he had derived some benefit from the goods." Gow states, page 69, that "to recover in an action for goods sold after such countermand, he must show, that the sale was adopted by the dissentient partner, or that he derived a benefit from the delivery." Kent, vol. 3, 45, remarks, "that the seller must show a subsequent assent of the other partners, or that the goods came to the use of the firm." Both these jurists refer to the case of *Willis v. Dyson* as authority. It is quite obvious, that there may be a difference between the goods coming to the use of the firm, and a benefit derived to the dissenting partner from their delivery to the firm. The bargain may have proved to be a very losing one, and this may have been foreseen by the dissenting partner, and have been the very cause of the notice; and why should he be held to pay, perhaps from his private property, for goods the purchase and sale of which may have absorbed the whole partnership stock, when he had

1. *Marquand v. N. Y. Man. Co.*3. *Peacock v. Peacock.*2. *Skinner v. Dayton*; 8 C., 10 Am. Dec. 286.4. *Crawshaw v. Maule.*

provided against such a calamity by expressing his dissent from the contract before it was consummated?

In the case of *Galway v. Mathew et al.*, 10 East, 264, one partner, after the other partner had given notice of his dissent, signed a note with the name of the partnership, and received the money and applied most of it to the payment of the partnership debts; and the decision was against the right to charge the dissenting partner. In the case of *Leavett v. Peck*, 3 Conn. 124 [8 Am. Dec. 157], the fruits of the contract went to the partnership, and yet the dissenting partner was held not to be liable.

Gow states, that in negotiable instruments, one partner can not bind another, who dissents, and gives notice of it; and alludes to no qualification, where the fruits of the contract are applied to the use of the partnership: Gow, 65. Collyer, page 214, says: "It seems also, that the mere disclaimer by one partner of the future contracts of his copartner will be binding on third persons, whatever be the effect of such an act between themselves, or whether it be, or be not in conformity to the partnership agreement." He afterwards also states the case of *Willis v. Dyson*, in the language of the court. Kent, after making the remark before stated, examines the cases, and as the result of it says: "It seems also to be the better opinion, that it is in the power of any one partner to interfere and arrest the firm from the obligation of an inchoate purchase, which is deemed injurious." This he could not do if he were bound by the goods coming to the use of the firm. It appears to be more in accordance with the general principles of law, and with good faith and fair dealing to hold, that a partner is not bound by a contract after he has given notice to the party proposing to make it, that he would not be bound by it.

Exceptions sustained, and new trial granted.

NOTICE OF DISSOLUTION OF PARTNERSHIP: See *Prentiss v. Sinclair*, 28 Am. Dec. 290, note; *Nott v. Downing*, Id. 491. As to notice of such dissolution by publication in a newspaper, see *Graves v. Merry*, 16 Id. 471.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

LAMAR v. McNAMEE.

[10 GILL AND JOHNSON, 116.]

SURRENDER OF LEASE, WHEN NOT WITHIN STATUTE OF FRAUDS.—Where a landlord enters into a parol agreement to pay a sum of money to his tenant, in consideration of the latter's surrendering his unexpired interest in a lease for years, and of the settlement of certain claims for repairs, and the tenant executes his part of the agreement by delivering possession of the premises to the landlord, according to the terms thereof, such agreement may be enforced by an action against the landlord.

APPEAL from Alleghany county court. The opinion states the case.

Perry, for the appellant.

McKaig, for the appellee.

By Court, STEPHEN, J. This appeal presents but one question for the decision of this court, and that arises upon the operation of the statute of frauds and perjuries, upon the agreement entered into between the parties, relative to the relinquishment by the appellee, of his unexpired interest in a lease for years, which he held under the appellant. The agreement was by parol, and possession was delivered by the tenant to his landlord, according to the terms of the contract of relinquishment.

It was contended by the appellant in the court below, that the agreement being a verbal one, was inoperative and void by the provisions of the statute of frauds, which requires the surrender of such an interest to be in writing, unless affected by the act and operation of law. The county court refused to sustain the objection, in consequence of which the evidence was permitted

to go to the jury, and the plaintiff obtained a verdict. It appears by the bill of exceptions, that the plaintiff to maintain the issue on his part, proved by a competent witness, that on the eleventh of August, 1834, he was called upon by the plaintiff and defendant, to settle a dispute between them, relative to a certain saw-mill, then held by lease in writing by the said plaintiff of him the said defendant; and that said lease would expire on the first day of April, 1835, next ensuing; and also some unsettled accounts existing between said parties relative to said leased premises. The plaintiff also offered in evidence, that the plaintiff agreed to and with the said defendant, to give up and surrender to him the said defendant, the possession of said sawmill and premises so leased as aforesaid, on the said eleventh day of August, 1834, and also to release and give up his claims against the defendant, for sundry sums of money, laid out by him in repairing the said leased premises, in consideration of which, the defendant promised to pay the said plaintiff the sum of one hundred and thirty-six dollars, for the recovery of which, this action was brought. The plaintiff then offered further to prove by the said witness, that in pursuance of said agreement, he did, on the same day, surrender and give up to said defendant, the actual possession of the said leased premises, and that the defendant has from that day held possession of the same, and that the plaintiff had abandoned or given up his claims for the repairs of the said leased premises. The defendant thereupon by his counsel, prayed the court to instruct the jury, that upon this proof the plaintiff was not entitled to recover, because the said agreement was by parol, and not in writing, and void by the statute of frauds. This objection being overruled by the court, the defendant appealed to this court, who have now to decide upon the legality of that opinion. After the best consideration we have been able to bestow upon this case, and the question raised in it by the bill of exceptions, we have come to the conclusion, that there is no error in the opinion of the court below, of which the appellant has a right to complain. We think it in perfect accordance with the well-established principles of law, and that the agreement, although by parol, according to the facts given in evidence, was legally efficient, and available to transfer from the appellee to the appellant, all his unexpired interest in the premises, vested in him by the lease, in virtue of which he held as tenant.

The agreement, although by parol, was not executory, but was immediately executed by the relinquishment of the posses-

sion of the premises by the tenant, and a simultaneous taking of the possession by the landlord. The occupation of the one ceased, and that of the other commenced, so soon as the contract was entered into. The principle seems to be well established that, although a tenant who has quitted in pursuance of a parol license from his landlord, and without having given a notice to quit, remains liable; yet if the landlord accepts a third person as his tenant, the acceptance of such substituted tenant operates as a surrender in law of the first tenant's time. For this principle see Roscoe on Evidence, 143, 144, and if the acceptance and substitution of a new tenant, will operate as a surrender of the term by operation of law, within the statute of frauds and perjuries, where the possession is vacated by the former tenant, prior to such substitution, it would seem, upon reason and principle, that the taking of possession by the landlord himself, upon the abandonment of the possession by the tenant in pursuance of a parol agreement, ought to have the same effect. His occupation ceases with the consent, and by the act of his landlord, and his liability for rent ought to cease and terminate with it. In 1 English Common Law Reports, an action was brought for the use and occupation of a house. The plaintiff proved that the defendant had been tenant from year to year of his house; the defendant proved a parol agreement, that the plaintiff would give up his claim to the rent on the defendant's giving up immediate possession in the middle of the quarter; both parties accordingly went before a magistrate, and the defendant there gave up the key, which the plaintiff accepted, and the defendant was never after that time in the possession of the premises. The plaintiff sought to recover for a term subsequent to his resuming the key, and he insisted that the tenancy was not thereby determined by reason of the statute of frauds. In that case, the counsel for the defendant contended, that as a less lease than three years may be created, so might it be surrendered without writing. Gibbs, C. J., observed that the clause of the statute of frauds which restricts estates created by parol to three years, had nothing to do with that which requires surrenders to be in writing. He then observed that the action could not be supported. The plaintiff had taken possession of the house, and the defendant could not therefore occupy it for the same time if he would.

The same principle is established in 15 English Common Law Reports, 229,¹ where the court held, that the action for use and occupation could not be sustained, there being a verbal agree-

1. The case of *Walls v. Atch son*, 3 Bing. 462; 11 E. C. Law, 228, is probably the one intended to be cited.

ment that the tenant should deliver up the possession of the house which the landlord took accordingly. In this case the decision in 1 English Common Law Reports' above referred to, is cited by the court and confirmed.

We do not think that there is anything in the case of *Lammott v. Gist*, 2 Har. & G. 433 [18 Am. Dec. 295], which impugns the principles sanctioned by the above decisions. In that case, the parol agreement to surrender was executory, and had not been consummated by the delivery of possession when the distress was levied by the bailiff of the landlord. The tenant still remained in possession, and it was optional with him whether he would fulfill his contract to surrender or not. Everything rested upon the parol agreement, and that agreement being inoperative and void by the statute of frauds, as he was not bound by it, so neither was it obligatory upon his landlord: for where both parties are competent to contract, a mutuality of obligation is deemed to be essential to its obligatory force upon either. For this principle, if authority be wanted for so plain a proposition, see 3 T. R. 653.¹ In that case, Oxley agreed to sell goods to Cook, if he would purchase them, and give notice of his assent to purchase by a limited period. He gave the notice within the prescribed period, but as the engagement in the mean time was all on one side, the seller was held to be at liberty to recede, upon the ground, that under the circumstances of the case, a mutuality of obligation was wanting. Considering the decision of the court below to be correct, we affirm their judgment.

Judgment affirmed.

The principal case is cited in *Kinsey v. Minnick*, 43 Md. 121, to the point that where one tenant leaves leased premises and another goes in, and the landlord accepts rent from the latter, this fact is evidence of a surrender of the tenancy. In *Lammott v. Gist*, 18 Am. Dec. 295, it was decided that a parol agreement between a landlord and tenant, that the latter should surrender the residue of his term in the premises leased to a purchaser, in consideration of which the landlord agreed to give up the rent in arrear, is within the statute of frauds.

The principal case is doubtless at variance with some of the English cases, and perhaps with *Norton v. Preston*, ante, 128. A purchaser of growing crops was, though he had reaped and taken them away, held protected by the statute of frauds from an action on the contract for the purchase price: *Falmouth v. Thomas*, 1 Car. & M. 89. In *Cocking v. Ward*, 1 C. B. 858, it was held that an action would not lie on a parol promise to pay plaintiff to surrender a lease under which she held, notwithstanding her having made the surrender in consideration of the promise. These cases conflict with the weight of American authority: Sm. L. C., 7th Am. ed., 593. When the sale of property

1. *Lloyd v. Crispe*, 5 Taunt. 249; 1 E. C. Law, 136, is probably intended. 2. *Cook v. Oxley*.

is void by the statute of frauds because no note or memorandum thereof exists in writing, it is worthy of remark that the transfer and acceptance of the property is generally sufficient to maintain an action for the purchase price; but the payment and acceptance of the purchase price will not uphold an action for the property: *Id.*

DE YOUNG v. BUCHANAN.

[10 GILL AND JOHNSON, 149.]

ASSUMPSIT FOR USE AND OCCUPATION can be maintained only where it is founded upon a contract express or implied.

TENANT FOR YEARS, OR FROM YEAR TO YEAR, WHO HOLDS OVER, without any new stipulations, after the expiration of his term, impliedly holds subject to all the covenants of the lease which has expired, so far as they are applicable to his new situation.

APPEAL from Baltimore county court. The defendant prayed the court to charge the jury, that the plaintiff could not recover in this suit; but the court refused to give this instruction, and there was a verdict for the plaintiff, from which the defendant appealed. The other facts are stated in the opinion.

Glenn, for the appellant.

Dobbin, for the appellee.

By Court, SPENCE, J. The action of assumpsit, for use and occupation, can be sustained where it is based upon a contract either express or implied; and unless it be thus founded, it can not be maintained: *Birch v. Wright*, 1 T. R. 387. In the case now under consideration, the term created by the written agreement was ended and determined on the twentieth day of August, 1834, and De Young, the tenant, remained in the possession and enjoyment of the premises, from the expiration of the lease until some time in the month of May, 1835.

It seems at this day to be well-settled law, that when a tenant for a term of years, or from year to year, holds over after the expiration of the term, without any new stipulations between the parties, he impliedly holds subject to all the covenants in the lease, which are applicable to his new situation: *Digby v. Atkinson et al.*, 4 Camp. 275; *Doe on demise of Rigge v. Bell*, 5 T. R. 471; 13 Johns. 297.¹ If this be a correct view of the law, it follows as a necessary and unavoidable conclusion, that in the absence of any new and express stipulations in such cases, and where the relation of landlord and tenant does exist, the law will

1. *Abel v. Radcliff*; 8. G., 7 Am. Dec. 377.

imply those terms, which are found in the contract which has expired. We are thus brought to the inquiry whether the record in this cause furnishes any evidence of any new conditions or supplemental contract, which will ascertain and define the terms of the relation between these parties; for upon this proposition alone it must depend whether the county court erred or not, in rejecting the defendant's prayer.

The material evidence in this cause, touching the terms and character of the relation between these parties, subsequent to the twentieth of August, 1834, is to be found in the written correspondence of George H. Newman, the plaintiff's agent, bearing date the twentieth of July, 1834, and the defendant's answer thereto of the thirtieth of the same month and year. Newman, the agent of the plaintiff, in his note of the twentieth of July, 1834, uses this unequivocal language to De Young, the defendant: "Mrs. Buchanan [will] require you to give her possession of the property on the twenty-first of August next, when your lease expires, or pay her a rent of one thousand dollars per annum, in quarterly payments, from and after the above date." He requests a prompt answer to this note, and concludes as follows: "If I do not hear from you definitely, on or before the thirty-first inst. I shall advertise the property for rent on the first of August, and consider myself at liberty to lease it to any other person, without further reference to you." In reply to this note, De Young says: "I beg to state that the rent I pay at present, is fully equal to the value of the property, and as much as I, or any one else, can afford to pay at these times; as soon as they improve, I will be ready to treat with you about an increase of rent, but for the next year the rent will have to stand at its present price."

Is there one expression to be found in this correspondence from which the human mind can deduce the most remote semblance of a contract, or agreement; it is nothing more or less than a demand on the one side that the rent shall be increased from six hundred dollars per annum, the former rent, to one thousand dollars, with a threat that the tenant will otherwise be turned out; with as prompt a declaration on the other side, that six hundred dollars is the value of the property, and as much as he could or would pay. We think the conclusion that there was not any new agreement, or contract, proved by this correspondence, is so clear that no argument on our part can make it more plain. It is admitted, and indeed the proof on the record showing, that at the time the suit was brought no part of the six hundred dol-

lars, the former rent, was in arrear; that the rent for the quarter ending the twentieth of February, 1835, was then paid, and as this was all the plaintiff would have been entitled to recover in this action, and under this proof, we are of the opinion the court below erred in not granting the defendant's prayer, and therefore reverse the judgment, with costs.

Judgment reversed.

TENANT HOLDING OVER WITHOUT NEW STIPULATIONS, holds impliedly subject to the covenants of his lease: *Vrooman v. McKaig*, 4 Md. 454, citing the principal case; *Diller v. Roberts*, 15 Am. Dec. 578, note 581.

HARRIS v. ALCOCK.

[10 GILL AND JOHNSON, 226.]

VENDOR'S TITLE IN GOODS IS NOT DIVESTED BY A SALE to a purchaser who conceals his insolvency, and, at the time of the purchase, has no intention to pay for them, or who, by the fraudulent aid of a creditor to whom he has confessed judgment, buys such goods in order that such judgment creditor may levy execution upon them.

NO INFERENCE OF FRAUD CAN BE DRAWN from the fact that one judgment is taken for three separate claims, where the object was to place each of the three creditors on an equal footing.

EVIDENCE OF WHAT WAS THE REAL CONSIDERATION OF A NOTE upon which a judgment has been confessed, may be admitted, where the validity of such judgment is assailed by creditors of the judgment debtor, on the ground of want of consideration for the note.

JUDGMENT MERGES DEBT DUE TO THE PARTY in whose favor it is rendered; but as to parties whose debts it is taken to secure, it is merely a collateral security for the payment thereof, and does not impair their rights to prosecute their claims either at law or in equity.

JUDGMENT CONFESSED IN FAVOR OF AN AGENT, for the benefit of himself and his principal, is not void because the record does not disclose the trust upon which such agent holds the judgment; and parol evidence may be introduced to prove the trust.

EXECUTION ISSUED FOR MORE THAN IS DUE on the judgment, is not, *per se*, fraudulent and void; it is only when issued with fraudulent intent that it is void, and if issued *bona fide*, it will avail the plaintiff to the extent of the debt remaining due.

DEBTOR'S EQUITABLE INTEREST IN PERSONAL PROPERTY can not, at law, be seized and sold under a *fiери facias*; but, after the return of the writ unsatisfied, the judgment creditor may, in equity, obtain leave to redeem the prior incumbrance, and then have the property sold to pay the incumbrance, and also the execution debt.

COURTS OF EQUITY NEVER SET ASIDE PROCEEDINGS AT LAW, except at the instance of those whose interests are affected by them.

EQUITY ALWAYS RATIFIES THAT, WHEN DONE, which, if previously applied to, it would have ordered to be done.

APPEALS from the equity side of Baltimore county court. Harris and Chauncey filed their bill in which they allege: That Brady confessed a judgment in favor of Richard E. Alcock, in a fictitious action of assumpsit, instituted on the same day the judgment was confessed, for the purpose of obtaining the same by filing a declaration by consent of the parties without issuance of any process; that the declaration was for money had and received, and for a promissory note for twenty thousand dollars, but the complainants charge that no money was due from Brady to said Alcock; that the note was made on the day on which the judgment was rendered, and was antedated; that no consideration for the note ever passed between said Brady and Alcock, but that it was made solely for the purpose of founding the judgment upon it; that it was confessed for forty thousand dollars, to be released upon payment of twenty thousand dollars; that Alcock, to induce Brady to confess the judgment, represented to him that he merely wanted to get some security to show Alcock & Co. and Cartlidge, who were creditors of Brady, but that the judgment was never to be enforced against him; that Alcock now pretends that the note and judgment were in consideration of certain debts due to Samuel Alcock & Co., Charles Cartlidge, and to himself. Complainants charge that this is false; that no such sum as twenty thousand dollars was due to all or any of them; that a large portion of what is due to those persons was not due at the time when the note was given; that there was no statement of account between Brady and said alleged creditors of the amount due; that said Alcock never gave any receipts as agent; that no document was ever executed to show that the judgment was intended to cover said debts; that none of the evidences of debt were given up to Brady when he confessed judgment, but, on the contrary, they were retained and protested for non-payment after the rendition of the judgment; that, after the confession of the judgment, Brady, with Alcock's knowledge and consent, contracted other debts for goods with various persons, and particularly with your orators; that shortly after the arrival of these goods at Brady's store, Alcock fraudulently caused a writ of *fiery facias* to be issued, grounded upon the aforesaid judgment confessed without consideration, and caused the sheriff of Baltimore county to sell all the goods in said store, including those purchased or pretended to have been purchased of your orators; that at the time of said sale Richard E. Alcock had full knowledge of all the before-mentioned facts; that when complainants delivered their goods

to Brady, they were entirely ignorant of said judgment and of the insolvency of Brady, and that the pretended sale of the goods by them is fraudulent and void; that said sheriff has in his hands eleven thousand dollars, the proceeds of the property seized and sold by him. Prayer that the judgment be vacated; that the sheriff be ordered to pay the proceeds of the sales into court, to be applied to the payment of the goods fraudulently obtained from the complainants.

The answer of Richard E. Alcock admits the allegations of the bill in reference to the confession of the judgment, the antedating of the note, and the declaration, but denies that there was no sum of money due to this defendant by said Brady, or that there was no consideration for the note; defendant had nothing to do with the drawing of the note, and knew nothing of it until a few moments before it was handed to him; that his counsel told him it was intended to serve as a cause of action, and as evidence of the debt which Brady told his counsel was due; denies that defendant ever gave Brady to understand that he would never take out execution on the judgment, or that he ever did anything to induce Brady to give him the judgment, except to ask him for some security for the debt due those whom he represented; alleges that the judgment was given wholly at Brady's instance, and that everything in regard to it was dictated by him; denies that Brady informed him he was insolvent, or that he knew it; claims that the judgment was for debts due Samuel Alcock & Co., Charles Cartlidge, and this defendant; avers that all the debts for which the judgment was confessed were due at the time of the confession of the judgment; admits that of the amounts merged in the note, six thousand six hundred and two dollars and eighty-six cents was not due before the time of taking said note; but avers that at the time of giving the note and taking the judgment, Brady agreed to consider this amount as due; admits that there was no statement of account, because there was no difference as to the amount due; that this defendant did not know that Brady had bought goods of the complainants. The answer then admits the taking out of the execution on the judgment; but alleges that defendant does not know from whom the goods levied on were purchased; denies all fraud in the sale so far as he is concerned, and insists that the property in the goods legally passed from complainants to Brady; and insists that his judgment should not be vacated. The answer of H. S. Sanderson, sheriff of Baltimore, declared his ignorance of the transactions leading to the judgment;

admitted the execution, levy, and sale, the proceeds of which, amounting to eight thousand six hundred and twenty-two dollars and ninety-eight cents, he held subject to the order of the court. The parties went into proof of their respective allegations. The facts in dispute are sufficiently stated in the opinion. A bill similar to the one above referred to was filed by Chapman and Erskine, but these complainants claimed under a deed of assignment executed to them by Brady, subsequent to the issue of the execution above referred to. The county court decreed that the bills ought to be dismissed with costs, being of opinion that the judgment obtained by Alcock against Brady was founded upon a valuable consideration, and was not fraudulent; that R. E. Alcock should stand as trustee for S. Alcock and Cartlidge to the extent of their claims against Brady, which the judgment was taken to satisfy. From this decree the complainants appealed.

Raymond and Evans, for the appellants.

Steele and Johnson, for the appellee.

By Court, Dorsey, J. The cases of *Harris and Chauncey v. Alcock*, and *Chapman and Erskine* against the same defendant, resting for the most part on the same questions of law and fact, and under the opinion of the court sharing the same fate, they will be considered and disposed of together, as if forming but one case. The question which, in its natural order, first presents itself, is, did the property in the merchandise mentioned in the complainants' bill, as sold to Brady, pass out of the complainants, under the circumstances attending the sale?

It is insisted that it did not, upon two grounds: 1. Because Alcock fraudulently aided and assisted Brady in making the purchase, with a view of levying an execution thereon as soon as it should arrive in the city of Baltimore. 2. Because Brady, at the time of the purchase, knew himself to be insolvent, concealed this fact from the complainants, and when he obtained the goods did not intend to pay for them. Either of these grounds, if established, would have entitled the complainants to relief. But, unfortunately for them, the proof in the record sustains neither of these, their pretensions, no such fraud as that imputed to either Alcock or Brady has been sustained by the testimony, and the right of property in the goods vested upon their sale and delivery.

The next ground upon which the appellants assert their right to relief, is, that the judgment confessed by Brady to Richard

E. Alcock is fraudulent and void, and in support of this assertion, they insist, that if the design of the judgment was, as is alleged, to obtain by way of judgment, security for the debts due by Brady to Richard E. Alcock, Samuel Alcock & Co., and Cartlidge, that a separate judgment would have been confessed to each creditor for the amount due to him; and that the omission to pursue that course, is evidence of a fraudulent design.

Is the inference warranted by the facts and circumstances under which the judgment before us was rendered? is the question we are to consider. Richard E. Alcock, we assume, was the authorized agent of Samuel Alcock & Co. and Charles Cartlidge, in obtaining the judgment, designed to secure the debts due to himself, and his principals. His design doubtless was, it ought to have been, so to arrange the matter that each of the three creditors should come *in pari passu*, in reaping the benefits to be derived from the security about to be taken, for the preservation of their claims. So far from the mode adopted to carry out the design, being any evidence of fraud, it is strong evidence that the agent intended to act with perfect fairness and justice in the transaction; nay, it is the only mode in which he could have done so, consistently with his duty to himself and his principals. If, as has been suggested, he had obtained a separate judgment for each creditor, that mutuality and perfect equality of benefits, which was in the contemplation of the parties, would in all human probability have been frustrated; a field would have been opened for a race of diligence between three judgment creditors, which would have operated injuriously to Brady, and was never contemplated by him or his creditors to whom the security was to be given. In taking the one judgment instead of the three suggested, Alcock acted in good faith both towards his principals and Brady; and their other creditors, in this respect, have no right to complain of the course which has been pursued.

It is also contended that the judgment is fraudulent and void as against the other creditors of Brady, because the note of twenty thousand dollars, on which it was rendered, was not given for a debt *bona fide* due from Brady to Alcock, and that this fact being established, the note is thereby impeached for fraud, and it is incompetent to offer testimony to sustain it by showing that it was given in part for a debt to Alcock, and for the residue on account of debts due by Brady to Charles Cartlidge and to Samuel Alcock & Co. The sole object of the note as is satisfactorily shown by the proof in the record, was to facilitate the

entry of the judgment, which Brady had agreed to confess, as a security for the three debts referred to, which debts, by the testimony admitted in the cause, coupled with the confession of the judgment, we think are sufficiently established. The note upon its face, does not in terms say, that it was given for a debt due from Brady to Alcock, but simply promises to pay Richard E. Alcock the sum of twenty thousand dollars for value received; as respects its validity it is wholly immaterial whether the note was given for a debt due to Alcock alone, or was given to him as the authorized agent of Cartlidge and Samuel Alcock & Co. (of which authority we think the record furnishes sufficient proof), for the purpose of obtaining the judgment rendered to secure the payment of their debts. But it is insisted in behalf of the appellants, that the testimony offered by the appellee, in relation to the judgment and note on which it is founded, is inadmissible, because you can not offer evidence to add to or contradict a deed, much less can you do so in relation to a record, which is of much greater solemnity; no evidence was adduced to add to or contradict the record. It was not offered to prove that the judgment was not rendered on the promissory note, and thus impeach the verity of the record; but the appellants having offered evidence to contradict the statement in the note, that it was given for value received, and alleging that it was wholly fictitious, without consideration, and fraudulent; the appellee, in perfect consistency with both note and judgment, offered the evidence on his part, to show that the transaction was *bona fide*, and not fictitious, without consideration and fraudulent, as was alleged; and to do this, he offered proof, not contradicting the note, not showing a different consideration from that expressed in it, but showing what in point of fact was the value received, which the note, upon its face, alleged to have been the consideration for which it was given. There surely on this point is no analogy between the case before us and that of *Betts and Wife v. The Union Bank of Maryland*, 1 Har. & G. 175 [18 Am. Dec. 283], and the other like cases which have been cited, where the testimony objected to, was adduced to prove a consideration of an entirely different nature from that expressed in the deed.

It is further urged, that the judgment is fraudulent and void against the other creditors of Brady, because the debts, to secure the payment of which it was given, were not merged in the judgment, nor were releases or receipts given therefor. There is no weight in this objection. The judgment did operate as a merger or extinguishment of the debt due to Richard E. Alcock. After

its rendition he could prosecute no suit upon his original cause of action. But as respects the claims of Cartlidge and Samuel Alcock & Co., it was no merger or extinguishment, but a mere collateral security for the payment thereof, and did not impair the rights of those creditors to prosecute any remedy at law, or in equity, which previous to the judgment they might have sustained. It is, however, wholly immaterial whether the judgment was an extinguishment of those claims or not, or was a mere collateral security for their payment; in neither event should such receipts or acquittances have been given.

The appellants also insist, that the judgment is fraudulent and void against the other creditors of Brady, because it adds a new debt of twenty thousand dollars to those already owing, inasmuch as it did not extinguish the claims on account of which it was entered, and no releases or discharges being given therefor, payment might be enforced both of the amount of the judgment and of the claims for which it was given. But the conclusion which has been drawn, is not warranted by the premises; the payment of both can not be enforced. By satisfying the judgment, the claims are extinguished, and by discharging the claims, the judgment is satisfied. It is likewise insisted, that if the judgment was paid, neither Brady nor his creditors could have proved for what debts it was rendered. Brady well knew for what debts the judgment was entered as a security, and his omission to take some written evidence thereof, or to provide some means of proving the same, would not make fraudulent and void a judgment, in all other respects unimpeachable. This court must pronounce the law upon the facts as they appear in the record, and can not set aside a judgment as fraudulent, all the facts and circumstances in relation to which being proved, show it to be otherwise, merely because the means of obtaining such proof in some future case may not be within the reach of the party complainant. But the difficulty apprehended is not insurmountable, a bill of discovery will readily remove it.

There is no foundation for the impeachment of this judgment on the ground that if Alcock were to receive and waste the amount due thereon, the debts due to Cartlidge and Samuel Alcock & Co. would still remain in full force against Brady; such receipt by Alcock works the immediate extinguishment of those debts, and no subsequent misapplication of it can ever revive them; nor is there more weight due to the objection raised by the appellants' counsel, that the trust upon which Alcock holds the judgment ought to have appeared upon the record, and can

not be proved by parol. There is no principle of law which requires such an entry upon the record, or prohibits the proof of such a trust by oral testimony. The cases referred to in the argument rest entirely on the express provision of the statute of frauds, and have no bearing upon the question on which they were cited.

From an attentive examination and consideration of all the evidence introduced into the record, we are satisfied that there was no fraud in the judgment rendered, or the means used in obtaining it.

The next point on which the appellants claim a reversal of this decree is, that the execution is fraudulent, as having been issued after the payment of Cartlidge's debt; even supposing that the judgment is not fraudulent, execution issued for the whole amount of the judgment, the payment made of Cartlidge's debt not being indorsed thereon as it should have been. The simple fact of issuing an execution for more than is due on a judgment, does not *per se* render the execution fraudulent and void. It is by the *quo animo* with which it issued, that its validity is to be tested; if issued with a fraudulent intent it is void, but if issued *bona fide* it is not void, and will be available to the plaintiff to the extent of the debt remaining due on the judgment: *Hollingsworth's Adm'r v. Floyd et al.*, 2 Har. & G. 87, and *Rudd and Miller v. Schlatter and Gilman*, 1 Litt. 19. There is nothing in the record from which any fraudulent design could be imputed to the appellee, in issuing the execution complained of. The proof in the cause repels all idea of collusion between him and the defendant; the appellants, therefore, are entitled to no relief on the ground of fraud in issuing the execution.

The last point raised by the appellants is, that the property taken under the execution was not legally the property of Brady, and that equitable interests in personal property are not the subjects of an execution, and consequently, that the execution in this case ought to be set aside. With the appellants' premises on this point as legal propositions, we see no reason to find fault, but to his consequence or conclusion as regards the exercise of the authority of a court of equity, we must be permitted to object.

It can not be denied as a legal principle, that a debtor's equitable estate in personal property can not at law be seized and sold under a *feri facias*. The usual mode by which a creditor pursues such interests of his debtor, and makes them available

for the payment of his debt, is to issue a *fi. fa.* and place it in the hands of the sheriff, and cause it to be levied or returned, thus showing that his remedy at law has failed, by which acts of diligence he acquires in the eye of a court of equity, a priority of right, or preference to the debtor's interest in the property, from the time his execution was placed in the hands of the sheriff, and upon application to a court of equity, he will be permitted to come in and redeem the prior incumbrance, and have a decree for the sale of the property thus disincumbered, for the payment as well of the amount of the incumbrance, as of the execution debt; or as is a more proper course of proceeding, he will obtain a decree without any clause of redemption for a sale of the absolute property; first to pay off the incumbrance, and then the creditor's execution. The property levied on in the case under consideration, is wholly inadequate to pay the appellees, the preferred creditors' debt. The appellants, therefore, have no right to ask a court of equity to set aside the proceedings under the execution; they have no interest in the subject-matter; courts of equity never interfere to set aside proceedings at law, but at the instance of those whose interests are affected by them.

But there is another ground upon which such interference should be refused. A court of equity will always ratify and confirm that when done, which as a matter of course, if previously applied to, it would have ordered to be done. If after the levy and before the sale under the execution in question, the court had been called on by the appellee, to decree the sale of the property seized under the execution, the relief asked for would have been unhesitatingly granted. The sale then having been made by the appropriate legal officer, so far from setting aside the proceedings under the execution, the court if applied to for that purpose, had it been necessary, would have decreed the ratification of the sale which had been made. Upon this, the last point of the appellants, see the cases of *Venable and McDonald v. The Bank of the United States*, 2 Pet. 107, and *McDermutt v. Strong*, 4 Johns. Ch. 691.

The views which we have already expressed upon the points raised by the appellants, render it unnecessary for us to examine or decide the objections to several of those points suggested by the appellee, upon the pleadings and issues, etc., in the cause, or to determine the question as to the validity of the deed to Chapman and Erskine, under the statute of Elizabeth. The decrees

of the county court in the cases of *Harris and Chauncey v. Alcock*, and *Chapman and Erskine v. Alcock et al.*, are affirmed with costs in this court and the court below.

Decree affirmed.

FRAUDULENT PURCHASER ACQUIRES NO TITLE to goods purchased, as against the defrauded vendor: *Root v. French*, 28 Am. Dec. 482, note 486, where other cases on this subject are collected.

JUDGMENT MERGES DEBT upon which it is rendered: *Speed's Ex'rs v. Hann*, 15 Am. Dec. 81, note.

EXECUTION ISSUED FOR TOO GREAT AN AMOUNT: See *Coltraine v. McCaine*, 24 Am. Dec. 256, where it was decided that such an execution was void; and see note to that case, page 263, for a discussion of this subject.

EQUITABLE INTERESTS ARE NOT GENERALLY SUBJECT TO EXECUTION: See *Martin v. Jewell*, 37 Md. 535, citing the principal case; *Combs v. Young's Widow*, 26 Am. Dec. 225, note 231; *Shute v. Harder*, 24 Id. 427; *Coombs v. Jordan*, 22 Id. 236, note 279; *Bligh's Heirs v. Banks*, 17 Id. 136, note 157; *Roads v. Symmes*, 13 Id. 621, note 627; *Jackman v. Hallock*, Id. 627; *Atkins v. Sawyer*, 11 Id. 188, note 193. But see *Punderson v. Brown*, 2 Id. 53. The principal case is cited in *Rose v. Bevan*, 10 Md. 466, and in *Myers v. Amey*, 21 Id. 305, to the point, that although a debtor's equitable estate in personal property can not be seized and sold under a *f. fa.*, yet a creditor may file his bill and obtain a decree for the sale of the property absolutely, and pay off the incumbrances, and then satisfy his own claim; also in *Bruce v. Levering*, 23 Id. 296, to the point that a sale will not be decreed where the party can derive no benefit from it. The principal case is distinguished in *Furlong v. Edwards*, 3 Id. 112.

HARDY v. SUMMERS.

[10 GILL AND JOHNSON, 316.]

PARTY HAVING EQUITABLE CLAIMS HAS A RIGHT to a discovery under oath from the defendant, to have all the proofs on which his claims depend taken in due form and submitted to the decision of a court of equity, and, if dissatisfied with its decision, to have it reviewed in the highest appellate tribunal in the state.

COUNTY COURT CAN NOT DEPRIVE PARTY OF SUCH RIGHT, by the summary exercise of the powers specially delegated to it under the act of descents.

FILING THE PETITION AND APPOINTMENT OF COMMISSIONERS, under the act of descents, is an *ex parte* proceeding, and the proceedings of the county court in confirming or rejecting their return is summary; and neither law nor custom requires the proofs exhibited by the parties to be reduced to writing, or in any way introduced into the record of the proceedings, so that an appeal to the court of last resort, even if permitted, would not avail the appellant.

COUNTY COURT HAS NO POWER TO DIVIDE REAL ESTATE of a decedent, except in cases where the parties entitled can not agree upon a division thereof.

MERE COVERTURE OF ONE OF THE PARTIES TO AN AGREEMENT for partition of real estate is not sufficient to invalidate it, where such agreement was made in the presence of her husband, assented to by him, consummated by an actual division, and possession taken and held according to it for fourteen years.

ACTUAL POSSESSION OF PARTY IS SUFFICIENT INTIMATION of his rights to put a purchaser upon inquiry as to the nature of such possession, and where he neglects to make it, equity charges him with the consequences of a knowledge of the title.

ALLEGATIONS OF ANSWER, ON MOTION TO DISSOLVE INJUNCTION, can be regarded only so far as they are responsive to the bill.

APPEAL from the court of chancery. James C. Summers and Mary his wife filed their bill in which they alleged: that Jonathan Hardy died intestate, leaving the said Mary and Anne Hardy, his only daughters and heirs at law; that he died seised of real and personal property, which he had frequently declared that he would dispose of by last will in a certain manner described in the bill; that he had prepared an instrument in the nature of a last will conforming to those views, but died suddenly without executing the same; that after his death, the complainants and Anne Hardy met and agreed to partition the property in the manner contemplated by their father; that the property of the deceased was accordingly divided, and the said Anne and Mary signed a bond, exhibited with the bill, binding them respectively to abide by the partition; that the said James C. assented to the execution of this bond by his wife, and always has been, and now is, willing to abide by its terms; that the several parties took possession of the property under such division and used the same; that said James C. has made many improvements on his real estate; that said Anne Hardy has greatly injured her portion of the estate; that said Anne having conveyed to one Thomas Talburtt her right and interest in the real estate of her said father, they now pretend that said agreement is not binding in law, because it was not reduced to writing nor signed by the parties to be charged thereby, or some person thereto lawfully authorized, and that the bond executed, as stated above, is of no force in law, because it was not signed by the said James C. Summers. The complainants insist that the agreement is binding, and that Talburtt purchased with full notice thereof; that he took possession of the part allotted to said Anne, and asked complainants to convey the same to him, which they agreed to do; yet the said Thomas did, on the seventeenth day of November, 1836, apply by petition to Prince George's county court for a commission to divide or value the real estate of the said Jonathan Hardy, which being granted, the commissioners therein

appointed divided the said real estate, by allotting to the said Thomas that part of the same which had been taken and held by the complainants, with the exception of about twelve acres, and allotting those twelve acres, and that part of the said estate which was formally taken and held by said Anne, to the complainants; that the report of the commissioners was ratified and confirmed by the court, notwithstanding the objection of the complainants, and complainants are now in danger of being turned out of possession of their said land, which the said Thomas threatens. Prayer for general relief, and an injunction to restrain said Anne Hardy and Thomas Talburt from interfering with or entering upon the said real estate held by the complainants. The answer of Talburt admitted his knowledge of the bond filed with the bill, but alleged that he was informed by the said Anne that the said James C. Summers told her, that unless she entered into said agreement she would receive no part of said estate; it denied the alleged improvements of Summers' part, and also the damage to Anne's part of the estate. He denied that he knew anything of the division of the property at the time of his purchase. The answer of Anne Hardy admitted her father's intention to give his property to her and her sister; she admitted that, ignorant of her rights, she consented to a division; that she executed the bond filed with the bill, being ignorant of its contents; that said James C. told her that if she did not execute it she would get no portion of her father's estate; that considering herself at his mercy she signed the bond; that the said Mary did not execute the same voluntarily, but was forced to sign it, as she believes, by the cruel treatment of her husband. At July term, 1838, there was a motion to dissolve the injunction on the bill and answers, which being overruled, the defendants appealed.

Pratt and Alexander, for the appellants.

Johnson, for the appellees.

By Court, DORSEY, J. It is insisted that the grounds for equitable relief, as set forth in the bill of complaint, were, heretofore, and finally adjudicated by Prince George's county court in the proceedings therein, under the act of descents, for the division of the real estate of Jonathan Hardy, between Talburt, the grantee of Anne Hardy, and Mary Summers and her husband; and that such adjudication is a bar to the relief now prayed for. The case set forth in the complainants' bill is one in which a court of equity only is competent to grant the appropriate relief.

If the facts stated in the bill be true, the relief asked for could not be denied. Whether these facts be true or false, it is the province of a court of chancery to decide upon proofs regularly before it, in a cause conducted according to the forms of equity proceedings.

The complainants, before their equitable claims could be definitely decided, had a right to a discovery on oath by the defendants, and to have all the proofs on which those claims depended taken in due form and submitted to the decision of a court of equity, and, if aggrieved by its decision, to have it reviewed in the highest appellate tribunal of the state, upon a full record of all the proofs and proceedings in the cause. Of these rights Prince George's county court could not deprive them, by the summary exercise of the powers specially delegated to it under the act of descents. To permit it to do so, would be an unheard-of innovation on the long-established forms of litigation in equity; would deprive the complainants of their right to purge the consciences of the defendants, or to bring their entire case, upon its merits, for trial before an appellate tribunal, or to have any adjudication thereon by the court of appeal. Under the act of descents, the filing the petition, and appointment of the commissioners, is an *ex parte* proceeding, and the proceedings of the county court in determining on the confirmation or rejection of the return of the commissioners, are summary in their nature, and no law requires, nor is it customary for the court to direct, that the proofs exhibited by the parties, should be reduced to writing, or in any way introduced into the record of the proceedings before it. An appeal under such circumstances could not avail the appellant, even if permitted, in the court of last resort.

But there is another reason why the chancery court should not be thus abruptly arrested in the prosecution of this suit on the ground of a prior adjudication in Prince George's county court; and that is, that if the allegations in the bill be true, the alleged prior adjudication is a nullity, being a proceeding *coram non judice*; the act of descents only giving power to the county courts to divide the real estate of a deceased person, where the parties entitled to the deceased's estate can not agree upon the division thereof. The principle of *res adjudicata*, therefore, on the present appeal, interposes no obstacle to the continuance of the injunction issued in this cause.

The next in its proper order, of the reasons assigned for the reversal of the chancellor's orders continuing the injunction is, because the agreement set out in the bill being made with Mary Sum-

mers, a married woman, is not binding upon Anne Hardy. The agreement, as charged in the bill and not denied in the answer, was made in the presence of the husband and assented to by him, and according to the statements in the bill, as admitted or not denied in the answers, the agreement was consummated by an actual division of the real estate of the deceased between the sisters, each taking possession, and holding according to such division, for at least fourteen years. The complainants still hold under such division the portion assigned them; Anne held her share till she conveyed to Talburtt, and after such conveyance he took possession of Anne's part, and offered to execute conveyances between himself and the complainants, conformably to the partition which had been made. We know of no principle, either of law or equity, under the circumstances, in which it was made, that would invalidate the agreement, simply on the ground of the coverture of one of the parties. As authorities for a contrary doctrine, see *Baxter v. Smith*, 6 Binn. 427; *Barnsfather et al., Executor of Moffat, v. Jordan et al.*, 2 Doug. 452; *Thos. Co.*, tit. 153, and *Bowyer v. Peake*, 2 Freem. 215. To refuse relief in the case before us on this ground only, would be against all equity and conscience.

The next reason assigned for the reversal of the chancellor's order is, that the defendant Talburtt is a *bona fide* purchaser without notice of the agreement entered into by Anne and her sister, or the proceedings under it, and as such, must be protected in a court of equity against such agreement and proceedings. But this defense, if properly pleaded, could not avail the defendant Talburtt. The actual possession of the complainants, according to the agreement and division under it, is a sufficient intimation of their rights, to have put Talburtt upon an inquiry into their nature, and failing to make it, he is in equity vested with all the consequences of a knowledge of their title.

The only remaining question to be considered is, has the equity of the bill been sworn away by the statements in the answers? We are clearly of opinion that it has not; most of the material facts constituting the complainant's equity, have been admitted, or not denied by the answers. As far as the statements contained in the answers are responsive to the charges in the bill, the complainants' equity remains wholly unimpaired. The matters in avoidance, relied on in the answers, which, when put in issue, if proved, might strip the complainants of all claim to relief, not being responsive to the bill, can not, in this stage of the cause, be relied on by the defendant, as grounds for the dissolu-

tion of the injunction. The orders of the chancellor continuing the injunction are affirmed, with costs.

Orders affirmed.

DISCOVERY, WHEN PARTY ENTITLED TO: See *Skinner v. Judson*, 21 Am. Dec. 691; *Wolf v. Wolf's Executor*, 18 Id. 313; *Middleton Bank v. Russ*, 8 Id. 164.

POSSESSION IS SUFFICIENT INTIMATION of possessor's right to put a purchaser upon inquiry: *Baynard v. Norris*, 5 Gill, 468, 483; and *Price v. McDonald*, 1 Md. 403, citing the principal case; *Johnston v. Glancy*, 28 Am. Dec. 45, and note 51, where other cases on this subject are collected. The principal case is cited in *Hamilton v. Whitridge*, 11 Md. 128, 143, to the point that an injunction will not be dissolved on motion, if the bill shows an equity and the answer does not deny such equity.

FOWLER v. LEE.

[10 GILL AND JOHNSON, 358.]

JUDGMENT BY DEFAULT AGAINST A SHERIFF for not returning an execution within the time limited by the court, has by the act of 1794, c. 54, sec. 1, the same effect, operation, and validity as a judgment on the verdict of a jury.

JUDGMENT AGAINST SHERIFF FOR NOT RETURNING EXECUTION will not be enjoined merely because the judgment debtor has obtained an injunction to stay proceedings on the judgment upon which such execution issued; and where the sheriff applies for an injunction against the judgment against himself, the court may inquire into the grounds on which the debtor obtained the first injunction.

COURT OF EQUITY WILL NOT ARREST EXECUTION of the judgment against the sheriff unless it would be unjust and unconscionable to enforce it.

MISCONDUCT OF SHERIFF IN FALSELY RETURNING service of a writ which he never served, is not of itself sufficient ground for setting aside the judgment founded upon such false return.

UNAUTHORIZED APPEARANCE OF ATTORNEY, and confession of judgment by him, is not sufficient ground for impeaching such judgment in a court of equity.

COURTS OF CHANCERY DO NOT INTERFERE WITH JUDGMENTS at law, except to prevent fraud, or to relieve from gross injustice; and they never grant an injunction merely for the correction of irregularities in legal proceedings.

PARTY SEEKING TO ENJOIN A JUDGMENT on the ground that he can not safely pay it, should file a bill of interpleader against the person who appears to be entitled, and pay the money into court for the person who shows his right to receive it.

APPEAL from the court of chancery. Samuel Fowler filed his bill in 1839, alleging that at the October term, 1837, the executors of James Fitzgerald, for the use of Samuel P. Lee, obtained a judgment at law against George Semmes; that a writ of *fi. fa.*

was issued upon this judgment, directed to said Fowler, who was then high sheriff; that a year after Fowler was laid under a rule to return the writ of *fi. fa.*, and a judgment by default was obtained against him; that shortly after the rendition of this judgment Semmes filed a bill against Lee, in which he prayed that Lee might be enjoined from enforcing the judgment of Fitzgerald's executors against him; that an injunction was granted, by which Fowler was enjoined from making the money on the *fi. fa.* aforesaid; that by the adjournment of the law term of the court the complainant was prevented from having the judgment by default against him stricken out; that he is informed and believes that Lee intends to issue execution on said judgment by default, although the complainant is prohibited by said injunction from making the money on the *fi. fa.* Prayer for an injunction forbidding execution on the judgment by default so long as the injunction on the original judgment remains. The bill was filed on the equity side of Prince George's county court, and the cause was afterwards duly transmitted to the court of chancery, where, on the thirtieth of April, 1839, the chancellor, on the motion of defendant Lee, dissolved the injunction, and the plaintiff, by permission, appealed to this court.

Alexander, for the appellant.

Magruder and Johnson, for the appellee.

By Court, DORSY, J. The provisions of the act of 1794, c. 54, sec. 1, are so explicit, as to leave no room for doubt or speculation as to the character and efficacy of a judgment by default, rendered against a sheriff for not returning an execution within the time limited by rule of court for that purpose. In the language of the act of assembly, it shall have the same effect, operation, and validity, as any judgment rendered upon any verdict of a jury. Suppose that, in this case, instead of a judgment by default, it had been a judgment rendered on the verdict of a jury, in a suit brought against the sheriff for neglect of duty in not returning the execution; would it follow as a necessary consequence (as it has been insisted), that if an injunction should subsequently be obtained by the debtor against the sheriff and judgment creditor, that the judgment against the sheriff must, also, be enjoined, and that in awarding an injunction on the judgment against the sheriff, you are not permitted to examine into the causes, the sufficiency or insufficiency of the grounds, on which the debtor obtained the first injunction?

A proposition so broad, and inconsistent with the design of

the act of assembly, can not be sustained. If it were, it would follow, that if the basis of the debtor's injunction were wholly insufficient to have justified its issue, and could by no possibility be, in equity, a ground for impairing the efficacy of the judgment against the sheriff; nay, if it were even the receipt of the amount of the execution by the sheriff himself, the judgment against the sheriff must notwithstanding be enjoined, and continue so enjoined, as long as the original injunction remained in force, even though it were made perpetual, upon the very ground that the sheriff had received under the execution the whole amount for which the creditor had obtained a judgment against him. If you can not look into the debtor's bill to see the ground upon which the original injunction issued, so neither can you look into it, to see the ground upon which it has been perpetrated. We do not think that the proceedings on the debtor's bill can work that estoppel, or have that conclusive effect, which has been ascribed to them, as between the parties litigant in this case. As to them, they are *res inter alios acta*, open to examination, and further than is consistent with equity and conscience, conclusive upon none of the rights of the parties in this cause.

A court of equity ought not to arrest the execution of the judgment against the sheriff; unless it appears, that it would be unjust and unconscientious to enforce it. Whether it be so or not, depends upon the facts set forth in the appellant's bill of complaint: his equity must be shown by his bill, or he is entitled to no relief. His liability at law is absolute and complete, and the legal rights of the appellee can not be interfered with, unless it be satisfactorily shown that justice and conscience demand such interference. The inquiry then necessarily presents itself—what are the grounds of equity set forth in the debtor's injunction bill? He admits the execution of the single bill, on which judgment was rendered against him—does not even intimate that any portion of it has ever been paid, or in any manner discharged, or make any statement to show, that either at law or in equity, he should be exempt from his obligation to pay it. But he states that, in executing the single bill (which is joint and several), he was the security of one George Harbin, who gave the same to George R. and John Fitzgerald, executors of Jane Fitzgerald, for property by him purchased at the sale of her estate; that George R. and John Fitzgerald have been long since dead, without having instituted any legal proceedings on said single bill, and that no further administration has been

granted on the estate of Jane Fitzgerald; that no suit was ever instituted on the single bill against said Harbin. That some time after the death of the said executors, Samuel Philip Lee, one of the heirs and legal representatives of said Jane Fitzgerald, having obtained possession of said single bill, instituted suit thereon in Prince George's county court against Semmes the debtor, and obtained judgment against him; that he had no knowledge of the said suit until judgment was rendered against him. "That he was never served with any process by the sheriff of Prince George's county, or either of his deputies, commanding him to appear and defend said suit, in consequence whereof judgment was obtained against him by means of fraud and surprise." These are the facts in Semmes' bill, upon which he calls upon Prince George's county court perpetually to enjoin the judgment rendered against him.

It is true he asserts, as an inference, that the judgment against him was obtained by fraud and surprise, because no process was served upon him, commanding him to appear and defend the suit; but such an inference is not the necessary result of the facts from which he has deduced it. The copy of the judgment which he has exhibited, shows, either, that he appeared to the suit in proper person, or by attorney, as the judgment was rendered by confession or by default. It does not allege, that there was any fraudulent concert or combination between Lee and the sheriff, and the attorney (if any) who appeared for him in Prince George's county court. The sheriff may have returned the writ, *cepi*, though never served, without being guilty of fraud. If so, he is liable in damages for his false return to the party aggrieved; but such official misconduct of itself, alone, forms no ground for setting aside the judgment in the cause. An attorney may, without instructions, have entered a voluntary appearance upon a *non est*, or appeared to a writ thus returned by a sheriff, and confessed a judgment without being guilty of fraud, or solely, on the ground of such misconduct, subjecting the judgment to impeachment in a court of equity. If the attorney has acted without authority, he is answerable to his principal for the consequence of his acts. It is not alleged, that by reason of the rendition of this judgment, Semmes has been rendered liable for the payment of a debt, which, *ex aquo* and *bono*, he is not bound to pay; that he was deprived of an opportunity of making a meritorious defense to the action, which he would have made, if apprised of its pendency; or that if the judgment were now opened, that he has any such defense to make.

Courts of chancery do not lightly interfere with judgments at law. It is only for the prevention of fraud, or to relieve from substantial injury or gross injustice, that its high and extraordinary power of interference by injunction is ever resorted to. It is never exerted merely for the correction of informalities or irregularities in legal or judicial proceedings. He who seeks to avail himself of such defects, must prosecute his remedies at law; from a court of equity he can receive no countenance. A court of chancery, too, looks well to the consequences of its acts, and the case must indeed be a strong one, which would induce it to nullify a judgment at law, and thus, as here, put it in the power of a debtor to plead the statute of limitations to a debt, which he does not deny to be justly due.

But suppose a court of equity would relieve against a judgment rendered under the circumstances before mentioned; upon what terms would relief be granted? "He who seeks equity must do equity," is a maxim almost as old as the tribunal to which it applies. To obtain relief by injunction against this judgment, Semmes should by his bill have offered to do equity, by paying into court the debt which, by his own statements, he had shown himself in honor and in conscience under an obligation to pay. It may be said that Semmes could not safely have paid the debt for which the judgment was rendered; that he might again be compelled to pay the same debt to the legal representatives of George R. or John Fitzgerald. If such was his apprehension, he has not relied on it, as a ground of relief; and if he had, it was his duty to have filed a bill of interpleader against such representatives and the appellee, and paid the debt into court, to be held for the benefit of the party showing his right to receive it.

It appearing to us, therefore, that there was no foundation for issuing the injunction on Semmes' bill; and that there is nothing against conscience and equity in enforcing the judgment against the appellant, rendered under the act of 1794, c. 54, we think the chancellor was right in dissolving the injunction issued in this case by the county court, and therefore affirm his order passed for that purpose.

Order affirmed.

JUDGMENT BASED ON FALSE RETURN OF SERVICE OF PROCESS: See *Taylor v. Lewis*, 19 Am. Dec. 135 and note 137, where this subject is fully discussed. See also *Stinson v. Snow*, 25 Id. 238, note 239.

UNAUTHORIZED APPEARANCE OF ATTORNEY, JUDGMENT IN CASE OF: See *Town of St. Albans v. Bush*, 23 Am. Dec. 246. The principal case is cited in

McCauley v. State, 21 Md. 569, to the point that when an attorney's appearance is entered it is presumed to be done by the authority of his principal, and whatever is done in the progress of the cause is esteemed the act of and binding upon the client.

COURTS OF EQUITY DO NOT LIGHTLY INTERFERE WITH JUDGMENTS AT LAW: *Windwart v. Allen*, 13 Md. 200; *Boyd v. C. & O. C. Co.*, 17 Id. 211; *Chappell v. Cox*, 18 Id. 519; *Gregory v. Ford*, 14 Cal. 142, all citing the principal case. See also *Haughy v. Strang*, 27 Am. Dec. 648, and note 650, where other cases are collected; also *Nevitt v. Gillerpie*, 26 Id. 696.

STONE v. MAGRUDER.

[10 GILL AND JOHNSON, 383.]

ATTACHMENT HAS NO VALIDITY, under the act of 1795, c. 56, unless there be issued with it a *capias* against the defendant, and a declaration or short note stating the plaintiff's cause of action be filed, and a copy thereof sent with the writ, to be set up by the sheriff at the court-house door.

GARNISHEE MAY RAISE THE OBJECTION that the *capias* was not issued, nor the short note set up, as required by the statute; and he may do so even after he has pleaded to the attachment and issue has been joined on his pleas.

JUDGMENT IN THE COUNTY COURT WILL BE ARRESTED for any substantial defect in the proceedings by attachment under this law.

APPEAL from Prince George's county court. This was a proceeding by attachment, and after issue was joined on the pleas of *non assumpsit* and *nulla bona*, the garnishee moved to quash the writ of attachment. The court granted the motion, and the plaintiffs appealed. The other facts are stated in the opinion.

Pratt and Alexander, for the appellants.

Magruder, for the appellees.

By Court, ARCHER, J. The court below on motion of the garnishees, quashed the attachment issued in this case. Several matters have been adverted to as irregularities in the proceedings, all of which it is not necessary for us to examine, but we shall advert only to one, which we consider as clearly fatal to the attachment.

It appears from the record that the attachment issued on the eighth day of May, 1837, that no *capias* was issued against the defendant until the twenty-eighth of June, 1837; and that the short note on the same day was made, and sent with the writ to the sheriff, to be set up at the court-house door. The act of assembly of 1795, c. 56, in its third section declares that, upon

the issuing of every attachment, there shall be therewith issued, a writ of *capias ad respondendum*, against the defendant, and a declaration or short note, expressing the plaintiff's cause of action, shall moreover be filed and a copy thereof sent with the writ, to be set up at the court-house door by the sheriff. By the plain and obvious construction of this section, the attachment *per se* would have no validity; it must always be attended with a *capias* and short note. In the language of the law, the *capias* is to be issued therewith, and a copy of the short note is to be sent with the *capias*.

There is nothing in the reason of the law, or the objects which the legislature had in view, to incline us to give it a different construction; on the contrary, everything to induce us to adhere to its literal and obvious import. The design of the law was, to bring in the defendant that he might appear to the action; and to accomplish this object, his goods are seized, a *capias* goes for his arrest, and a note is set up in a place calculated to give it publicity, displaying the cause of action, that the defendant may have notice of the proceeding against him. As the design of the latter was notice to the defendant, it would seem to be important that it should be cotemporaneous with the attachment; that as great a time as possible should be allowed him to obtain information of the proceeding. If the sending out the short note may be delayed as was done in this case, five or six weeks, why may it not be postponed until the day before the condemnation? If we depart from the time prescribed by the law, there could be no limitation of time for sending it out, short of the period of condemnation. The result would be, that the design of the legislature in giving notice would be entirely defeated.

There can be no doubt of the ability of the garnishee to take this objection. He is a party to the attachment, and could at all times plead to it or object to its illegality or irregularity; and if by the act of 1795, c. 56, the *capias* and short note be necessary, as we believe they are, to give validity to the attachment, it is proper that he should have the power, as well to present this objection to the court, as any other irregularity upon the face of the attachment itself. It was said by the general court that, for any apparent defect in the proceeding by attachment, the attachment may be quashed upon suggestion of such defect to the court, either by the defendant himself or a third person, claiming an interest in the property attached: *Campbell v. Norris*,¹

1. *Campbell v. Norris*.

3 Har. & M. 552. The practice has constantly conformed to this doctrine.

It has been supposed in the argument of the appellants' counsel, that as the garnishee had pleaded to the attachment, and issue was joined on the pleas of *non assumpsit* and *nulla bona*, and as a motion to strike out the plea of limitations had been made, which was undisposed of by the court, the motion to quash came too late. Authorities have been cited to show, that applications to set aside proceedings should be taken early, and that the party intending to make such application, if he take any steps, can not afterwards take advantage of such irregularity. As a general proposition, however true this may be, it does not apply to the case before the court. It is said in 5 Har. & J. 132,¹ "that where the proceedings are particularly described by a statute made on the subject, that course of procedure, so described, must on the face of the record appear to have been, if not literally, at least substantially, complied with." This was said, too, in a case of attachment under the law of 1795, c. 56, after the case had been tried on issues in the county court.

In the case of *Prentiss and Carter, Garnishees of Story, v. Gray*, 4 Har. & J. 192, the court of appeals reversed the judgment of the county court after a trial on issues, for irregularity in the proceedings upon which the attachment was founded. For any substantial defect in the proceedings by attachment under this law, the judgment in the county court would, on motion, be arrested; and the motion to quash should be heard at any stage of the proceedings, for if founded on proper reasons, it would render nugatory all proceedings which might be had in the trial of the merits of the cause.

We are therefore of opinion that the motion to quash was rightly decided by the county court, and affirm their judgment.

Judgment affirmed.

Cited in *Brent v. Taylor*, 6 Md. 69; in *Campbell v. Webb*, 11 Id. 471; and in *Spear v. Griffin*, 23 Id. 431, to the point that under the act of 1795, an attachment has no force unless attended with the *capias* and short note; in *Lambden v. Bowie*, 2 Id. 338; in *Howard v. Oppenheimer*, 25 Id. 386; and in *Everson v. Selby*, 32 Id. 347, to the point that where a defect is apparent in the proceedings, the attachment may be quashed on a suggestion to the court by the defendant, or by a third person claiming an interest in the property; and in *Barr v. Perry*, 3 Gill, 318, to the point that the garnishee is a party to the attachment, and can at all times plead to it, and object to its illegality or irregularity.

DEFENSES OF GARNISHEE: See *Hanna's Syndics v. Lauring*, 13 Am. Dec. 339, and note 341; *Mathis v. Clark*, 12 Id. 688.

1. *Shivers v. Wilson*; 8 C., 9 Am. Dec. 497.

JONES v. HARDESTY.

[10 GILL AND JOHNSON, 404.]

OBJECTION THAT WITNESS WAS EXAMINED without notice being given to the opposite party, or that a party to the suit was examined as a witness, can not, since the passage of the act of 1832, c. 302, sec. 5, be allowed in the court of appeals, unless it appears from the record that it was raised by way of exception in the court below.

ANSWER OF ONE DEFENDANT IS NOT EVIDENCE against his co-defendant, in chancery.

PAROL EVIDENCE IS NOT ADMISSIBLE to prove the contents of a written contract; but where the written contract is merely an act of one of the parties to a prior oral agreement, performed in execution thereof, the existence of such written contract will not exclude evidence of the oral agreement.

PARTY IS NOT PERMITTED TO SET UP STATUTE OF FRAUDS as a bar to the specific execution of a parol agreement, where he has received a valuable consideration for the performance of his part of the agreement, although it was not to be fulfilled for more than a year from its date; courts of equity regard such a case as without the purview of the statute.

COURT OF EQUITY WILL INTERFERE BY INJUNCTION to restrain a party from enforcing a legal right against all equity and conscience.

STATUTE OF FRAUDS DOES NOT APPLY to the case of a promise to a debtor, founded upon a full consideration, to discharge a debt due by such debtor to a third person.

DECLARATIONS OF A PARTY, WHICH ARE DISCREDITED by his own answer, are not entitled to any weight in the determination of a case.

COURT OF EQUITY WILL NOT REFUSE RELIEF TO A PARTY against a judgment, on the ground of his not having made his defense at law, where the agreement upon which his defense depended was void at law, being within the statute of frauds; or where the defense rested upon matters done in the execution of an express trust.

QUESTION OF VARIANCE BETWEEN ALLEGATIONS AND PROOFS in a cause can not, since the act of 1832, c. 302, sec. 5, be considered in the court of appeals, unless exceptions to the admissibility of the evidence or the sufficiency of the averments of the bill were filed in the court below.

ASSIGNEE OF NON-NEGOTIABLE CHOSE IN ACTION takes it subject to all the legal and equitable defenses of the obligor or debtor, to which it was subject in the hands of the assignor.

ALL PROPERTY AND RESPONSIBILITIES OF A PARTNERSHIP, by the death of a partner, devolve on the surviving partner, and in a suit in relation thereto, the personal representative of the deceased partner need not be made a party.

APPEAL from the equity side of Frederick county court. Joshua Jones filed his bill alleging that John R. Jones borrowed two thousand dollars from Lucy Harwood, and gave therefor his note under seal, with the complainant as security; that John R. Jones, who was in mercantile business in Baltimore, became largely indebted; that the firm of Samuel Jones and Richard S.

Hardesty had indorsed for him to a considerable amount, and becoming alarmed applied to him for indemnity; that to quiet their fears he gave to Samuel Jones, acting partner of the firm of Jones & Hardesty, a bill of sale of his stock of goods and of all his other personal property; that this bill of sale, though absolute on its face, was designed as collateral security to Jones & Hardesty, to secure them against any loss that might happen to them from their indorsements, and was not to have been recorded until it met with the approbation of the complainant; that complainant on hearing of this transaction became anxious in reference to his responsibility for J. R. Jones, and went to Baltimore to see him in reference to the matter; that J. R. Jones expressed great confidence in his ability to meet all demands against him, but S. Jones, of the firm of Jones & Hardesty, placed the above-mentioned bill of sale on the records of Baltimore, and then pressed J. R. Jones for the transfer of his books, notes, and accounts, threatening to close up the store under the said bill of sale; that complainant objected to this transfer, unless Lucy Harwood's note should be provided for; that S. Jones thereupon, acting for the firm of Jones & Hardesty, promised that if the complainant would waive his objection to the proposed transfer of the said books, notes, and accounts, that he would obligate himself to pay out of the effects of the said J. R. Jones, the said note, and that if the effects of said J. R. Jones should not hold out, to pay his debts, the complainant should under no circumstances lose more than two hundred dollars; that the complainant, with this understanding, waived his objections to the transfer, which was accordingly made; that it was understood and agreed at the time of the transfer that the Harwood note should be paid for as soon as it could be conveniently done, and that Jones & Hardesty were to pay the accruing interest thereon until paid; that complainant has been informed, and so charges, that the goods and other personal property, and the debts due to the said J. R. Jones which passed into the hands of Jones & Hardesty, were amply sufficient, with proper management of the trust reposed in them, not only to pay the amount for which they had indorsed, and the note of Mrs. Harwood, but all other debts of the said J. R. Jones; that neither Jones nor Hardesty has executed the trust nor rendered any account thereof, though frequently requested so to do; that Samuel Jones has since died, and J. R. Jones has filed a bill against Hardesty and the executrix of Samuel Jones, alleging the said trust and claiming a large balance; that Samuel Jones during his life-time regarded himself

as bound to pay the Harwood note, and promptly paid the interest on it while it remained in the hands of Mrs. Harwood; that Hardesty himself had paid interest on it up to August, 1832; that Jones & Hardesty were also partners in another firm, composed of themselves and one Dennis H. Battee; that Battee purchased the interests of Jones and Hardesty in this firm, and gave them the said note of Mrs. Harwood, his mother, which he had obtained from her, in part payment of their interests; that by reason of the existence of the foregoing facts, the note of Mrs. Harwood was, in law and equity, canceled and paid the moment it reached the hands of Jones & Hardesty; that after Jones' death, Hardesty, as surviving partner, had gone on to manage the concerns of J. R. Jones, and in that character had delivered the Harwood note to Mayhew and Bernard as collateral security for a small debt due them by Jones & Hardesty, although in fact and in law it had been canceled and paid; that Mayhew and Bernard had brought suit in the name of Mrs. Harwood against complainant and J. R. Jones, and had obtained judgment for the whole amount; that execution had issued thereon, and the property of complainant had been levied on and would be sold unless prevented by the interposition of this court. The bill then prayed for an injunction against the parties concerned in enforcing the note of Lucy Harwood. An injunction prohibiting proceedings on the judgment at law was issued upon the bill.

The answer of Hardesty denied that the bill of sale was not to be recorded without complainant's consent; denied that Samuel Jones told complainant that he would obligate himself to pay the Harwood note out of the effects of J. R. Jones; it alleged that J. R. Jones insisted that as soon as the notes indorsed by Jones & Hardesty should be paid, his books and effects should be returned to him, and that he would himself pay the Harwood note; that J. R. Jones would not consent that Jones & Hardesty should pay said note; that J. R. Jones' effects would not pay his debts; that in taking said note from Battee they did not intend to extinguish it, or pay it for J. R. Jones, as they had no funds for that purpose; that considering said note in full force, they had transferred it to Mayhew & Co., to whom Jones & Hardesty were indebted; that if any such promises, as those alleged by complainant, were made by Samuel Jones, they were made without defendant's knowledge or consent; that such promises, if made, were without consideration and within the statute of frauds, as being by parol. The

answer of Mayhew admitted that he received said note from Jones & Hardesty to be collected, and when collected to be applied towards the payment of the debt due to Mayhew & Co., from Jones & Hardesty; it also alleged that the defendant was ignorant of the agreement alleged in the bill. The answer of J. R. Jones insisted that Jones & Hardesty were bound to pay said note, and that they had received sufficient effects to discharge it. The answer of Battee alleged that Jones & Hardesty were bound to pay said note out of the effects of J. R. Jones, and that Samuel Jones had induced this defendant to procure said note, admitting the liability of Jones & Hardesty to pay it, and that they would receive it from him as a payment. Lucy Harwood's answer insisted that Samuel Jones informed her that her note was to be paid out of the effects of J. R. Jones, and that Jones & Hardesty were pledged to release Joshua Jones from his liability for J. R. Jones. Complainants filed a general replication, and a commission issued. The questions decided upon the evidence are stated in the opinion. At the final hearing the county court decreed that the injunction should be made perpetual, and the defendants appealed.

Schley and Worthington, for the appellants.

Palmer, for the appellees.

By Court, DORSEY, J. Before we examine the facts in this case, it is necessary to dispose of the questions raised, as to the admissibility of portions of the evidence taken in the cause, because upon their determination will in some measure depend what are the facts on which we are called to decide.

The first objection of this kind was taken to the testimony of Charles A. Warfield, who it appears was examined as a witness on the part of the appellants, without any previous notice thereof being given to the appellee. Previous to the act of assembly of 1832, c. 302, sec. 5, such an objection to testimony, if taken in this court, must have been sustained. But the act of assembly referred to is conclusive against the allowance of any such objection in the appellate court; unless it appears by the record that it was raised by way of exception in the court below.

The next objection to the testimony is, to the evidence of Dennis H. Battee, who, it appears, though a defendant in the cause, was examined under the commission, without a previous order for that purpose having been obtained from the county court. Had this irregularity been made the subject of an exception to the testimony in the county court, it might have been

available to the appellants in this court. But no such exception having been there made, the act of 1832, in terms the most imperative, prohibits its being "noticed, or determined, or acted upon" by this tribunal.

The questions of evidence following those of which we have spoken, arise upon the answer of Lucy Harwood, one of the defendants in the court below. It is insisted, on behalf of the appellee, that her answer is evidence against her co-defendants, who claim title under her. In support of this position it is asserted, that the declarations or answers of a nominal plaintiff, after he has assigned all his interest in the chose in action sued on, are evidence at law, against the *cestui que use*: and being so at law, they are equally so in a court of equity. Without stopping to examine the correctness of the first branch of this proposition, that such declarations or answers are evidence at law to destroy the rights of the beneficial plaintiff; does the second branch of the appellee's position follow as a necessary consequence of the admission of the first? We think not. The principle, with the reasons upon which it is founded, that the answer of one co-defendant is not evidence against another, is stated with great perspicuity by the learned judge who delivered the opinion of this court in the case of *Hayward v. Carroll*, 4 Har. & J. 518, from which the following is an extract: "It is an established principle of evidence, that the answer of one defendant can not be read in evidence against a co-defendant. If the complainants were interested in establishing a fact by the evidence of a co-defendant, they might have examined him, as a witness, on interrogatories, and the witness then would have been subject to the cross-interrogatories of the other defendant. To withhold from such defendant the privilege of cross-examination, would be unjust, and this injustice must necessarily result from the practice of permitting the answer of one defendant to be read in evidence against a co-defendant." Now a nominal plaintiff can not at law be compelled by the defendant to submit to examination as a witness in the cause. If we were then for this reason to concede the correctness of the first branch of the appellee's position, the second branch is not established by it; because, it is sustained by no such reason. A defendant in chancery, a nominal party, may be examined as a witness against his *cestui que use*, a co-defendant. It must, however, be admitted, that the appellee has referred to two adjudications, which, if followed by this court, would render the answer of Lucy Harwood evidence against her co-defendant Mayhew. And these decisions emanate from that learned tri-

bunal, with which we have ever concurred with confidence and differed with distrust.

The cases referred to are those of *Field v. Holland*, 6 Cranch, 8, and *Osborn v. The United States Bank*, 9 Wheat. 738. We have given to them a thorough examination and respectful consideration, but not being convinced of their correctness by the reasons assigned in their support, and being unable to reconcile them to an otherwise unbroken series of authorities both English and American, we do not hold ourselves bound to conform to them.

Entertaining these views, we can not do otherwise than say, that the answer of Lucy Harwood is no evidence against the co-defendants. If her testimony were material to the appellee, he should have obtained it by examining her as a witness in the customary mode. As authorities in point on this branch of the case, see *Phoenix v. Dey et al.*, 5 Johns. 412; 1 Stark. Ev. 284, 285, and the cases there referred to: *Hughes and Ballinger v. Worley*, 1 Bibb, 200; *Bullett v. Marshall*,¹ 2 Id. 470; *White v. Robinson*, 1 A. K. Marsh. 567;² *Hunt and Blanton v. Stevenson*,³ 1 Id. 570.

The next objection to the testimony in behalf of the appellee is, that it is inadmissible, being oral evidence of a written contract between Samuel, Joshua, and John R. Jones, which written contract, it is alleged, is the assignment executed by John R. Jones to Samuel Jones. If the oral contract referred to had been reduced to writing by the parties, or if it was intended that the assignment should be such written contract of the parties; then might it be contended, in the absence of all proof of fraud, surprise, or mistake, that the oral evidence offered by the appellee was inadmissible. But it is manifest from the proofs in the cause that the agreement entered into never was reduced to writing; and there is nothing in the record to show that it ever was intended to be reduced to writing. The assignment was not intended to be the written agreement of the parties; it was nothing more than an act done by one of the parties in execution of the oral agreement into which he had entered. With as much propriety might it be contended, if the assignment, instead of being in writing, had been orally made by an actual delivery to the trustee, under and in conformity to the agreement which had been previously entered into, that such oral assignment or delivery was the only appropriate evidence that could be offered of the agreement. The oral contract in this case, made between the parties (apart from the time of its com-

1. *Bartlett v. Marshall*.

2. 1 A. K. Marsh. 569.

3. *Hunt v. Stephenson*.

plete execution being postponed to a period beyond a year from its date, of the consequence of which we shall hereafter speak), is as valid and obligatory, as if it had been reduced to writing. Suppose then the contract, at the time it was made, had been reduced to writing and signed by the parties, and subsequently, in execution thereof, this assignment had been executed by John R. Jones, would it be pretended that the assignment was the written contract of the parties, and superseded and annulled the written agreement previously executed? Certainly not. So neither does it supersede nor annul the valid oral contract previously entered into. It was not designed to be the written evidence of the contract of the parties, but the mere act of one of them, performed in execution of it, and upon no principle of reason, law, or justice, can it have the operation attempted to be imputed to it. The testimony therefore is not objectionable on this ground.

It has been objected to, also, on another ground, that being to be performed more than one year after the time the contract was entered into, the statute of 29 Car. II., c. 3, which has been pleaded, prohibits the establishment of the contract by other than written proof. We think this defense can avail the defendants nothing. Under the assignment, Jones & Hardesty have received a full and valuable consideration for the performance of their part of the agreement, and to permit them or those claiming under them, now to set up the defense of the statute in bar to the specific execution of the contract, would be a fraud upon the appellee, and in such cases courts of equity, interposing for the prevention of frauds, will decree the specific execution of the contracts, regarding such cases as without the purview and design of the statute.

And upon the same principle, they will interfere by injunction in a case like the present, to restrain a plaintiff from enforcing a legal right against all equity and conscience. Another objection insisted on against the testimony is, that it is an attempt to establish by oral proof, a promise to pay the debt of another, contrary to the statute of frauds. If this were an effort on the part of a creditor, seeking to charge a third person with a debt already due to him from another, there might be some plausibility in the argument. It would be an effort to establish orally two subsisting liabilities to the same person, for the same debt; which is clearly prohibited by the statute. But such is not the design, nor the effect of the testimony offered in this case. It is a new and original promise to a debtor, founded (as must be

assumed in this aspect of the case) upon a full consideration to discharge a debt due by such debtor, and is no more a case within the statute, than it would have been if the promise had been, instead of paying a subsisting debt, to pay to the debtor a sum of money of the same amount.

Much has been said in relation to the declarations of John R. Jones, touching the matter in dispute in this cause. 'Tis true, they are testimony; no exception to their admissibility having been taken in the county court, as required by the act of 1832. But when discredited by the answer of John R. Jones, which is competent evidence for that purpose, they are entitled to no weight or consideration in the determination of the case.

Having disposed of the several objections raised on the evidence in the cause, we will now proceed to consider the several legal grounds, which have been urged in bar to the relief sought by the appellee. And first in its order, is the objection to the jurisdiction of this court; the equity, it is alleged, upon which relief is sought in this case, being a complete legal defense, of which the appellee might and ought to have availed himself in the county court in the suit upon the bond. To this objection the answer is natural and easy. If the agreement were, as we are inclined to regard it, a promise on the part of Jones & Hardesty to pay Lucy Harwood's bond when it became due, more than two years afterwards, it was, as contended by the appellants, embraced by the statute of frauds, and therefore void at law, and could only be enforced in a court of equity upon the principles before stated. Upon another ground we think the appellee was not bound to have made his defense at law. The defense rested altogether upon matters done in execution of an express trust, where the effect of a trustee's acts mainly depended on his intention in doing the acts. In such a case we think the appellee was not bound (conceding to him the power to have done so) to have made his defense at law, but was at liberty to have gone for redress into a court of equity, where he might purge the conscience of the trustee in relation to the subjects matter in controversy.

The next reason assigned for the reversal of this decree is, that the promise of Jones in behalf of Jones & Hardesty, to pay Lucy Harwood's bond, is a *nudum pactum*; and therefore, of no obligation either at law or in equity. After reading the testimony, it is difficult to conceive upon what ground such a suggestion could have been made. We do not mean to discuss the question, further than to say, that the consideration proved, is abundantly sufficient to support a promise at law or in equity.

The decree of the county court, it is said, must be reversed on account of the variance between the allegations in the bill and the proofs in the cause. Whether there be such variance or not, we have deemed it unnecessary to inquire, because, according to our interpretation of the fifth section of the act of 1832, c. 302, it is immaterial whether there exist such variance or not; no exceptions having been filed in the court below, either to the admissibility of the evidence, or the sufficiency of the averments of the bill, the complainant is entitled to an affirmance of the decree in this court, if warranted by the proof, whether his *allegata* and *probata* correspond or not.

In behalf of the appellant Mayhew, it is insisted that, under the act of 1829, c. 51, he is authorized, as assignee of the bond, to sue thereon in his own name, and consequently, that he took the bond discharged from the equity interposed by the obligor to its recovery. Without stopping to examine how far Mayhew is such an assignee, as under the act of 1829, is competent to sue in his own name, let us see how far, under the act of assembly, his rights as against the obligor have been protected and enlarged. The preamble to the act, as well as the enacting clause, shows that the design of the legislature was no further to extend the powers, or enlarge the rights, of the assignee, than to enable him to sue in his own name. And the saving clause reserves to the obligor or debtor, "all such legal or equitable defense, as might or could have been had and maintained against the assignor or assignors, at the time and before notice of such assignment, in the same manner and to the same extent as if no such assignment had been made." We think, therefore, that this act of assembly does not impair or change the rights, either legal or equitable, of the obligor or debtor, whether the suit be instituted in the name of the assignor or assignee. But it is insisted that the equitable relief sought by the appellee in this case, can not be extended to him, because Mayhew, the assignee, is a *bona fide* purchaser for a valuable consideration without notice. The assignee before us, stands entitled to no such protection, either upon principles of law or equity, if he were such a purchaser, or upon the facts in the cause as disclosed by the record. His answer—the only evidence upon the subject—demonstrates that he never purchased the bond; that he never paid or advanced one dollar as the consideration for the assignment; on the contrary, that it was placed in his hands for collection, and that when collected he was to carry the proceeds to the credit of a debt antecedently due to him from Jones & Hardesty.

Mayhew stands before the court clothed with none of the attributes of a *bona fide* purchaser, without notice. But suppose he did—as respects the equities or defenses of the appellee, either at law or equity, his condition is unchanged. He who takes an assignment of a chose in action not negotiable, takes it subject to all the legal and equitable defenses of the obligor or debtor, to which it was subject in the hands of the assignor. If he accepts the assignment in ignorance of their existence, without using the appropriate means of acquiring a knowledge of them, the consequences are the merited result of his negligence. It is his duty, if he wishes to avoid the effects of secret equities, to seek information from the obligor or debtor, who, if he withholds it when properly applied to for its disclosure, must submit to the consequences which are visited upon fraudulent concealment.

An objection has been raised to the decree, that a necessary party is not before the court; that the administratrix of Samuel Jones should have been made a defendant. We think this objection furnishes no ground for the reversal of the decree of the county court. The complainants seek no decree, and, according to the proofs in the cause, could obtain none against the representatives of Samuel Jones. In receiving the assignment, he acted for and in behalf of Jones & Hardesty, and was in effect the mere instrument, or conduit, through which the property assigned passed to them. By his death all the partnership property and responsibilities of the firm, devolved on Hardesty, as the surviving partner, who is bound for the performance of all contracts and engagements in relation to the partnership business, entered into by his deceased partner, for the benefit and in behalf of the firm.

The various legal objections to the decree before us having been examined, we must now see how far the proofs in the cause entitle the appellee to the relief he has received at the hands of the county court. Looking to the bill of complaint and the answer of Mayhew, and the uncontradicted testimony of the witnesses, William Turnbull and Dennis H. Battée, it satisfactorily appears to this court that Samuel Jones did, for and in behalf of the firm of Jones & Hardesty, for a valuable consideration, moving from John R. Jones, promise to pay the bond for two thousand dollars, to Lucy Harwood at its maturity, out of the funds received under the assignment made by John R. Jones; and that in the event of the insufficiency of those funds for that purpose, that Joshua Jones should contribute to its payment to

the amount of two hundred dollars. It does not sufficiently appear by the proof in the record, that an adequate amount of the funds collected under the assignment, and applicable to the payment of the bond, have come into the hands of Jones & Hardesty, or of Hardesty the surviving partner. The *pro forma* decree of the county court is therefore erroneous in enjoining the judgment for the whole amount. The perpetual injunction awarded by the decree of the county court should have left the plaintiffs at liberty to issue an execution on the judgment for the sum of two hundred dollars, with interest thereon from the day when the bond was payable, and costs of suit. This court will therefore pass a decree reversing the *pro forma* decree of the county court, but without costs, and decreeing a perpetual injunction as above mentioned, but without costs to either party.

Decree reversed in part.

ERROR NOT OBJECTED TO AT TRIAL BELOW can not be taken advantage of on appeal: *Nesbitt v. Dallam*, 28 Am. Dec. 237, and note 244, where other cases in this series are collected.

JUDICIAL ADMISSIONS AS EVIDENCE: See *Owens v. Dawson*, 26 Am. Dec. 49, note 52.

WRITTEN CONTRACT EXCLUDES PAROL EVIDENCE of a prior verbal agreement, in the absence of all proof of fraud, surprise, or mistake: *McElderry v. Shipley*, 2 Md. 35; *Worthington v. Bullitt*, 6 Id. 196; *Farrell v. Bean*, 10 Id. 228, all citing the principal case. See also *Haven v. Brown*, 22 Am. Dec. 208, note 212, where other cases on this subject are collected.

STATUTE OF FRAUDS, EFFECT OF ON CONTRACTS PERFORMED ON ONE SIDE ONLY: See note to *McCampbell v. McCampbell*, 15 Am. Dec. 63; *Norton v. Preston*, *ante*, 128; and *Lamar v. McNamee*, *ante*, 152.

PARTNERSHIP PROPERTY ON DEATH OF PARTNER passes to the surviving partner for the payment of debts of partnership: *Wilder v. Keeler*, 23 Am. Dec. 781, note 789; *Alsop v. Mather*, 21 Id. 703; *Burgwin v. Hostler's Adm'r*, 1 Id. 582.

The principal case is cited in *Gardiner v. Hardey*, 12 Gill & J. 380, to the point that on an objection to testimony, the point decided by the court is its admissibility or inadmissibility, not the sufficiency or insufficiency of the reasons assigned for its rejection; in *Windwart v. Allen*, 13 Md. 193, to the point that intendments are made in support of acts of ministerial officers, where they appear to have done their duty, and the *onus probandi* is on those who seek to impeach such acts; in *Cox v. Sprigg*, 6 Id. 286, to the point that the act of 1829 only allows an assignee to sue in his own name, but does not alter the nature of the assignment; in *Gibbs v. Gale*, 7 Id. 87, to the point that whatever is testimony in a case must be considered, and given its full force; in *Small v. Shaefer*, 24 Id. 161, to the point that wherever the main purpose and object of the promisor is not to answer for another, but to subserve some purpose of his own, his promise is not within the statute of frauds, although it may be in form a promise to pay the debt of another; in *Giddings v. Seevers*, Id. 379, to the point that an assignee of a chose in action not negotiable takes it subject to all defenses to which it was subject in the

hands of the assignor; in *White v. Solomonsky*, 30 Id. 590, to the point that if dealings between parties are such that the creditor has parted with his remedy against his first debtor under the new promise of the third party, the undertaking is original, and not within the statute of frauds; and in *Johnson v. Robertson*, 31 Id. 491, to the point that an answer of a defendant is not to be received as binding upon his co-defendant.

McPHERSON v. TALBOTT.

[10 GILL AND JOHNSON, 499.]

SURETIES ARE SUPPOSED TO ASSUME THE SAME RISK, and to stand, in relation to their principal, in the same situation, obtaining no benefit from the transaction, but each equally subjecting himself to responsibility.

CONTRIBUTION FROM CO-SURETY, WHEN SURETY NOT ENTITLED TO.—Where a surety, without his co-surety's knowledge, by a previous arrangement with the principal, receives one half of the sum borrowed, he is not entitled to contribution from such co-surety.

APPEAL from the equity side of Frederick county court. Talbott filed his bill against McPherson, charging that one Reynolds borrowed a sum of money from one Traill, for which he gave his single bill, with Talbott and McPherson as sureties; that Traill sued thereon, recovered judgment, and levied execution on the property of appellant and appellee; that complainant paid one half of the debt; that Reynolds is insolvent; that Reynolds executed to McPherson a bill of sale of his property, at a time when he was in failing circumstances, to indemnify him from loss on account of his indorsement of other notes and of the said single bill; that McPherson has sold the property, and that if the funds in his hands arising from such sale were applied to the payment of Traill they would be nearly, if not quite, sufficient for that purpose. Prayer for an account and an equitable application of the fund. McPherson's answer admitted the execution of the bill, but denied that he was a co-surety with Talbott; admitted the proceedings at law and Reynolds' insolvency; and alleged that he paid one half of the judgment; alleged further, that in fact Talbott was alone known to him as the principal debtor in the bill at the time of the execution; that the money was paid by Traill to Talbott; that defendant became a party to the bill at Talbott's solicitation, and to accommodate him and as his surety; that afterwards learning that Reynolds and Talbott had divided the money between them, he pressed Reynolds for indemnity. The answer admitted the sale of Reynolds' property, but denied all obligation to account to Talbott. The result of the evidence taken is stated in the

opinion. The county court decreed that McPherson pay to Talbott one half the sum received by him from Reynolds for the payment of Traill's debt. McPherson appealed.

W. A. Schley, for the appellant.

Palmer, for the appellee.

By Court, ARCHER, J. We are of opinion that the complainant has no equity which would enable him to recover against the defendant, as co-security with him for Reynolds. The loan was in fact obtained for the mutual benefit of Reynolds and Talbott, by an understanding and agreement between Reynolds and Talbott, anterior to the loan. The money obtained was divided between them, each taking one half of the sum borrowed. This understanding and agreement, we have no evidence, was ever communicated to McPherson.

If we are to take Reynolds' evidence as true, then he was held out to McPherson as the principal, and he was by him invited to be his security with Talbott. Under such circumstances, it would not have occurred to McPherson that the loan was to be equally for the benefit of his co-security. Securities are always supposed to assume the same risks and responsibility, and to stand relatively to the principal in the same situation, neither obtaining any benefit by the transaction, but each equally subjecting himself to responsibility, relying on the ability of the principal to meet the engagement, and relying on each other's willingness to embark in the same risks and responsibility. McPherson may have relied on the willingness of Talbott to go security, and may have been influenced to become the security by the confidence reposed by Talbott in the solvency and ability of Reynolds, supposing that Talbott was in the condition of an ordinary security. But if he had been informed, that Talbott's signature had been purchased by a promise to let him have half the money, as a consideration upon which he would give his name to Reynolds as security, it is by no means certain that he would have incurred the obligation. The concealment of the fact by Talbott that he was to derive an advantage by the loan, operated as a fraud upon the co-security, who had a right to suppose that he was conferring a benefit solely upon the principal.

The co-security might be very willing to obligate himself for the principal, but unwilling to assume responsibility for the surety, and to the extent of that part of the loan, which passed by agreement into the hands of Talbott, it was put to a hazard to which the co-security had never subjected it, and might have

been entirely unwilling to have subjected it. To be sure, McPherson would not have objected to the uses to which Reynolds chose to apply the sum borrowed, after he had obtained it; that he may be presumed to have been willing to trust to his prudence and discretion; but it is the previous agreement, to allow the security to participate in the loan, without the disclosure of that fact, which, in our judgment, forms the objectionable feature in the transaction. The most entire fairness on the part of securities, each would have a right to exact; their situation should be equal, and this may be demanded in all cases where contributions for losses are sought by one security from another.

Decree reversed with costs, and bill dismissed.

CHAMBERS, J., dissented.

AM. DEC. VOL. XXXII—12

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

GIBSON *v.* COOKE.

[20 PICKERING, 15.]

DRAFT BY A CREDITOR TO THE AMOUNT OF THE WHOLE DEBT, is valid as an assignment thereof.

AN ASSIGNMENT OF OR ORDER TO PAY PART OF A DEBT OR FUND is inoperative and invalid unless assented to by the debtor; and, without such assent, no action can be maintained against him thereon.

DRAFT EXCEEDING THE AMOUNT DUE, and not corresponding to any sum which will become due, need not be accepted by the drawee, and if not accepted, constitutes no basis for an action against him by the payee.

ASSUMPSIT by Gibson for the use of Shepherd Plympton on a draft dated October 23, 1822, by which Gibson requested Cooke to pay to Plympton's order one hundred and seventy-five dollars and thirty-three cents, "as my income becomes due." Gibson's mother had devised and bequeathed certain real and personal estate to Cooke, in trust, to collect the rents and profits thereof, and to divide and pay the net proceeds quarterly among her seven children during their natural lives. Cooke refused to accept the draft. The other facts sufficiently appear from the opinion.

Aylwin and Paine, for the plaintiff. The draft is an equitable assignment, to the amount thereof, of the funds which should come into the hands of the drawee belonging to the drawer: *Dix v. Cobb*, 4 Mass. 510; *Crocker v. Whitney*, 10 Id. 316; *Jones v. Witter*, 13 Id. 304; 2 Story Eq., secs. 1040-1057.

Cooke, in person, cited and relied upon *Picquet v. Swan*, 4 Mason, 463.

By Court, DEWEY, J. Is the draft in question an equitable

assignment of any funds of Gorham Gibson in the hands of the defendant, and available as such for the benefit of Plympton? The doctrine of equitable assignments has been gradually extending to meet the convenience of trade and business, and has been favorably viewed in the courts of law, subject, however, to the legal principle, that in such cases the assignee can enforce his claim only in the name of the assignor, unless there be an express promise by the debtor to pay the assignee. Under this limitation, choses in action generally may be the subject of an assignment; and debts which are contingent and money yet to come due, may well be assigned, these circumstances only operating to postpone the liability of the debtor until the contingency happens and the money becomes payable.

It seems also to be equally well settled, that a draft by the creditor on his debtor in the form of a bill of exchange, to the amount of the debt or the whole fund in his hands, is a good and valid assignment of the debt or fund: *Crocker v. Whitney*, 10 Mass. 318; *Clarke v. Adair*, cited in *Master v. Miller*, 4 T. R. 343; *Cutts v. Perkins*, 12 Mass. 209; *Robbins v. Bacon*, 3 Greenl. 346. But the defendant insists that his liabilities to the assignor were not of such a nature as to authorize the assignment of them by Gibson. He claims that the funds of the assignor were placed in his hands as a personal trust, to be applied by him directly to the support and maintenance of Gibson.

Upon examining the will of Susan Gibson, the devise under which the defendant holds these funds appears to be a general one to him, as residuary devisee of all the estate, real, personal, and mixed, of the testatrix, to hold in trust, to collect and receive the income thereof, and to pay over and divide equally the net proceeds thereof, once a quarter, to and among her seven children, of whom Gorham Gibson was one. It would, we apprehend, be somewhat difficult to sustain the position, that this was a personal trust, to be exercised in any degree at the discretion of the trustee as to the time and mode of payment. The direction in the will is, that the income be divided equally among the children, and paid over once a quarter. There are no saving clauses, nor any allusion to the alleged bad habits of Gorham Gibson. His rights are, by the terms of the will, precisely the same as those of each of his brothers and sisters, and for anything that appears, he may enforce them in the same manner. It is unnecessary, however, to express any decided opinion on this point, because upon another ground the defense is clearly sustained.

As regards the defendant, it is to be remembered the whole proceeding is *in invitum*, he not having accepted the draft, nor having been in any way instrumental in its creation, and there being no privity between him and the payee, Plympton, except such as the law creates between one holding funds as a debtor or trustee, and a person to whom the creditor or *cestui que trust* may have assigned. The defendant is therefore fully authorized to resist this demand, upon any valid objections to the legal operation of the alleged assignment.

We have before remarked that courts of law, while they protect unnegotiable choses in action in the hands of an assignee for a valuable consideration, do not give such force and effect to an assignment, not assented to by the debtor, as to authorize an action in the name of the assignee. Another rule adopted in courts of law having a direct bearing upon the present case, and which seems well sustained upon sound principle, as well as authority, is, that an order or draft for a part only of the debt or liability of the drawee does not, against his consent, amount to an assignment of any portion of the debt or liability, and does not authorize the institution of a suit in the name of the assignor for the whole, or any part of the sum due from the debtor: *Robbins v. Bacon*, before cited; *Mandeville v. Welch*, 5 Wheat. 577.¹ The reason of this rule is the very obvious one, that a debtor is not to have his responsibilities so far varied from the terms of his original contract as to subject him to distinct demands on the part of several persons, when his contract was one and entire. While the equitable rights of an assignee can be enforced by one action, and that in the name of the original creditor, and for the whole amount due, but little if any hardship is imposed on the debtor; but to extend this liability to an indefinite number of persons for any portion of the debt, or to authorize a suit to be instituted by one assignee for a part only of the debt, leaving the original creditor to enforce his claim for the residue in another suit, would be both unreasonable and oppressive.

To apply the rule to the case at bar, we must recur to the form of the draft upon the defendant. Gorham Gibson drew his bill of exchange for the sum of one hundred and seventy-five dollars and thirty-three cents, "to be paid as my income becomes due." What were the funds in the hands of the defendant? Gibson was entitled to one seventh part of the net income of the estate that passed to the defendant under the will of Susan Gibson, to be paid to him quarterly. The average quarterly amount,

1. 5 Wheat. 277.

as appears by the statement of facts, would be about thirty-seven dollars and fifty cents. It does not appear that at the time of the assignment, or at any period since, the whole amount due to Gorham Gibson would correspond with the amount of the draft. The liability of the defendant was limited to the payment of sums corresponding in amount with the net proceeds due at the expiration of each quarter. If he was liable to be called upon through the medium of an assignee holding a draft, that draft must be for the entire sum due, either at the expiration of one quarter or of several quarters united. Such does not appear to have been the case here. Any appropriation different from the rule above stated, and which would require a partial payment of the net proceeds of a quarter, is one which Gorham Gibson was not authorized to make, and which the law has not imposed on the defendant any liability to discharge.

Plaintiff nonsuit.

ASSIGNMENT OF PART OF A FUND DUE the assignor does not amount to more than a draft or bill of exchange, and does not bind the drawee until he has accepted it: *Palmer v. Merrill*, 6 Cush. 287. It is not competent for a creditor to render his debtor liable to a third person, by an assignment of a part of the debt due him: *Tupp v. Brownell*, 12 Id. 381; *Knowlton v. Cooley*, 102 Mass. 234. The assent of the debtor is not, however, necessary to give validity to an assignment of the entire debt: *Macomber v. Doane*, 2 Allen, 542; nor is an acceptance requisite where a draft is drawn on a bank, payable out of a larger fund, lying there to the credit of the drawer: *Bullard v. Randall*, 1 Gray, 606, citing the principal case.

THE ASSIGNEE OF A CHOSE IN ACTION MUST BRING HIS ACTION in the name of his assignor: *Parkhurst v. Dickerson*, 21 Pick. 310; *Pickens v. Hathaway*, 100 Mass. 248, citing the principal case; see likewise, *Miller v. Bledsoe*, ante, 37.

HEARD v. LODGE.

[20 PICKERING, 53.]

JUDGMENT IN FAVOR OF A CORPORATION ESTABLISHES ITS CORPORATE EXISTENCE as against the parties to the suit; and if the defendant be an administrator, the existence of the corporation can not, in the absence of collusion, be controverted by his sureties in an action upon the same judgment.

SURETIES OF ADMINISTRATOR ARE, BY A JUDGMENT AGAINST HIM, ESTOPPED, for most purposes, from denying the validity of a debt established by it against him.

JUDGMENT COLLUSIVELY SUFFERED BY AN ADMINISTRATOR, DOES NOT BIND HIS SURETIES; nor are they bound if it was obtained in an action commenced more than four years after he gave notice of his appointment as required by statute.

ATTORNEY AT LAW HAS POWER TO INSTITUTE ALL PROCEEDINGS required to make effectual a judgment obtained by him. He may, therefore, demand payment of such judgment of an administrator, pursuant to sec. 3, c. 70, of the revised statutes.

ONE OF SEVERAL ASSIGNEES may demand or receive a debt on behalf of all.

OBJECTION THAT A DEMAND IS MADE AT AN IMPROPER TIME OR PLACE is waived, if not taken at the time, and especially if it is met by an unqualified refusal.

WAIVER OF DEMAND takes place when the party entitled to it shows that it would be disregarded or would prove useless.

DEBT on administrator's bond against Giles Lodge and his sureties, brought by John Heard, judge of probate, for the use of the Boston glass manufactory, a corporation. Plaintiff proved a judgment in favor of this corporation against the estate and goods of Mary Langdon, deceased, under the administration of Lodge; that this estate had been represented insolvent; that the judgment had been presented to the commissioners and they reported the amount due; and that the estate finally turned out not to be insolvent. Objection was interposed that the demand on the administrator was not made by any person duly authorized, nor in a proper time, place, and manner. The grounds of this objection, as well as the other material facts, sufficiently appear in the opinion. Verdict by consent for the whole penalty of the bond, was entered in favor of plaintiff, subject to the opinion of the whole court.

Austin, attorney-general, for the defendants. The statute provides that the administration bond may be put in suit by creditor of intestate, when he shall have recovered judgment against the administrator, and the latter has neglected "upon demand made by the creditor to pay the same, or to show sufficient goods or estate for that purpose." The demand was insufficient because not in the alternative "to pay" or "to show sufficient goods;" and because not made "by the creditor."

C. P. Curtis, for the plaintiff.

By Court, *Dewey, J.* To maintain this action, it is incumbent on the plaintiff to establish two points: 1. That a judgment has been obtained in a court of law against the administrator on the estate of Mary Langdon, in favor of the Boston glass manufactory, for whose benefit this suit is instituted; 2. That payment of the sum thus ascertained to be due, has been demanded of the administrator.

The first of these points is proved by the records of this court, and not controverted by the defendants. As to the question of

a demand on the administrator for the payment of this judgment, the defendants resist it on several grounds. 1. They deny ~~that~~ there was any such corporation, having a legal existence and competent to make a demand, as the Boston glass manufactory.

Upon the trial before the jury, the plaintiff claimed that the judgment rendered in favor of the Boston glass manufactory, against the administrator, was conclusive evidence of the existence of the corporation, and particularly so, as it appears ~~that~~ the precise fact of the existence of this corporation was put in issue and determined in that action. The judge ruled that ~~this~~ judgment was conclusive evidence of the existence of the corporation at the time of the rendition of the judgment, but ~~that~~ evidence was admissible to prove a dissolution of the corporation after that time and before the making of the demand. It is now urged on the part of the defendants, that the judgment referred to was, as regards these sureties, between other parties, and therefore they are not bound by it.

To most purposes, it seems to us, that the sureties in an administration bond are, as well as the principal, estopped from controverting the validity of a judgment ascertaining the amount of a debt to be paid by the administrator. They are in many respects like the sureties in a bail bond, and equally bound by the proceeding against the principal. The duty they have assumed is, that their principal will pay on demand all debts ascertained by judgment of a court of law against him in his capacity as administrator, if the estate be solvent. His failure to make payment is a breach of the administration bond. The sureties are not to be concluded by a judgment suffered collusively by the administrator, and they have also the right to insist that the action against the administrator in the name of the creditor shall be commenced within four years from the time when the administrator shall give the public notice of his appointment required by the statute. This statute provision was undoubtedly intended for the benefit of the sureties. It is a positive bar arising from lapse of time, which can not be waived by the administrator, nor in any way be answered or avoided. Its effect is therefore controlling and decisive, and to this extent the sureties may object to the effect of a judgment against their principal, when sued on their bond to the judge of probate. Such was the decision of this court in the case of *Dawes v. Shed*, 15 Mass. 6 [8 Am. Dec. 80], cited by the counsel for the defendants. But that case furnishes no precedent for this defense, inasmuch as no such objection as was there urged,

exists here. We are satisfied, that as to all those matters of defense going to the merits of the debt as between the original parties, the judgment against the administrator must be taken to be conclusive in a suit on the administration bond, where there has not been fraud or collusion. In the present case the facts not only fail to show any such collusion, but it is quite apparent that the administrator resisted the former action upon the same ground, as the defendants are now desirous of presenting in this suit.

The defendants offered some evidence to the jury, for the purpose of proving a dissolution of the corporation after the rendition of the judgment against the administrator, but it was clearly insufficient for the purpose, and that point was not understood to be urged further by the counsel for the defendants. But the defendants insist that no legal demand has been made, because of the insufficiency of the authority of the agent by whom the same was made. The authority of Mr. Sullivan to act in the matter was placed by the plaintiff on two grounds: 1. That he was the attorney of record in the suit of the Boston glass manufactory against the administrator; 2. That he was one of the assignees of the corporation, and an agent with general authority from his co-assignees to do any act necessary to settle the claims of the company. His authority as the attorney of record would, in our opinion, authorize him to make the demand, and upon payment to discharge the judgment. It is within the scope of the powers of the attorney to institute all such further proceedings as are necessary to render the judgment effectual to the creditor in the recovery of his debt. It has been held to be the imperative duty of an attorney in the original action, where the body of the debtor was arrested, to institute a *scire facias* against the bail; and if he neglect so to do, he is held responsible.

It was clearly within the authority of Mr. Sullivan, as the attorney of the creditor, to take all the preliminary measures requisite to the institution of a suit on the probate bond. If this were doubtful, we think he had ample authority arising from his relation to this debt, as one of the assignees and the agent of his co-assignees. It was objected on the part of the defendants, that an authority to four persons to act for the corporation, could not be properly held to authorize acts in their behalf by only one of their number. It is undoubtedly true in many cases of delegated authority, that it requires the united act of all the constituted agents or attorneys to the legal exercise of the power delegated to them, but that the mere authority to

receive money on a debt due to their assignor may be exercised by one of several assignees, in behalf of all, seems to us too obvious to be questioned.

But it is further contended, that the demand was not made in a suitable place, and also that there was no absolute refusal of payment on the part of the administrator. Upon recurring to the facts reported in the case, it seems that after the recovery of the judgment against the administrator, Mr. Sullivan notified Lodge of the fact, and requested payment, to which Lodge replied that no decree had yet been made by the judge of probate, and that when it was made the money would be paid. After the decree was made, and after various written communications between the parties in reference to this claim, it appears that Mr. Sullivan met Lodge in State street, and again requested payment, which was refused by Lodge. Some further conversation ensued between the parties, which is particularly detailed in the report of the evidence given at the trial. The judge ruled, that if one party intended to make a demand, and the other so understood it, and did not object to the time or place, nor propose any other for that purpose, but expressed an intention not to pay, it was a legal demand in this respect.

Is there any objection to the rule of law as thus stated? It is a familiar legal principle, that the necessity of a formal demand is often waived or obviated by the conduct of the other party, or where the state of the case is such as to show that a demand would have been entirely unavailing. It is particularly true in a case where the party wholly denies the right of him who seeks performance, that the demand need not have all the formalities that would be essential, if the party conceded the right of the other, and only claimed the privilege of performing the contract or duty devolved on him, at a different time or place.

Many cases to this point are found in the books. In the case of *Richardson v. Learned*, 10 Pick. 262, a demand was made six miles from the dwelling-house of the defendant, for the delivery of property which he was bound to deliver at his dwelling-house. The defendant replied to the demand, that he meant to keep the property; and this was held, under the circumstances, a sufficient demand. A very strong case of the extent of this principle of waiver of legal demand on the part of an executor, is that of *Miles v. Boyden*, 3 Id. 213. In that case the executor, being called upon by the father of the legatee, who was an infant, for the payment of a legacy, refused paying

the same, assigning as a reason that there was no legacy given to the infant by the will of the testator, but making no objection to the authority of the father to make the demand; and it was held by the court, that the executor had thereby waived the necessity of any other demand, although by law the father had not by virtue of that relation to the legatee, a legal right to demand payment of the legacy.

The legitimate object of a demand is to enable the party to perform his contract or discharge his liability, agreeably to the nature of it, without a suit at law, and whenever one party wholly denies the right of the other, a demand must be useless. The rule in chancery seems to be, that if the defendant in his answer denies the right of the plaintiff, he can not also insist in his defense that there was no legal demand; as was held in *Ayer v. Ayer*, 16 Pick. 327. But at law it is otherwise to this extent, that if the defendant does not by his declarations and conduct furnish any evidence from which the jury can infer a waiver, or if the circumstances of the case do not clearly show a demand could not have been complied with, the defendant may on the trial insist upon proof of a demand, although he also denies the right of the plaintiff.

Upon a full consideration of the various objections taken by the defendants, the court are of opinion that the law was correctly stated by the judge at the trial, and that judgment should be rendered on the verdict.

The principal case has been cited in support of the following positions: The judgment against a constable in his official capacity is *prima facie* evidence against his sureties who are sought to be charged therewith: *Lowell v. Parker*, 10 Metc. 315. If one undertakes to pay a certain proportion of any default made in the payment of a mortgage debt, due by another, the decree of the court in which the mortgage is foreclosed is *prima facie* evidence against such guarantor of the amount of the mortgage: *Prichard v. Farrar*, 116 Mass. 213. In the absence of fraud or collusion the judgment rendered against the principal in a bail bond, previously to the execution of the bond, is conclusive against the sureties of the debt thereby ascertained: *Way v. Lewis*, 115 Id. 27. But the surety of an administrator will be allowed the benefit of the statute of limitations, even if not pleaded by his principal: *Robinson v. Hodge*, 117 Id. 224. The want of a demand will be excused if it would evidently if made have been inoperative: *Moore v. Fargo*, 112 Id. 258; *Griggs v. Morgan*, 9 Allen, 39. The principal case is also cited in *Chilson v. Adams*, 6 Gray, 363.

HOW FAR JUDGMENT AGAINST EXECUTOR OR ADMINISTRATOR CONCLUDES HIS SURETIES.—The law upon this subject is not well settled. The courts seem equally divided between those which hold that a judgment against an administrator, establishing a *devastavit* by him, will conclusively entitle to a recovery on the administration bond, and those which hold that such judgment is at most only *prima facie* evidence against the sureties.

The following from the opinion of the court in *Irean v. Calhoun*, 25 Cal. 223, delivered by Sanderson, C. J., illustrates the views of the first class: "As a general rule, sureties upon official bonds are not concluded by a decree or judgment against their principal, unless they have had their day in court or an opportunity to be heard in their defense; but administration bonds seem to form an exception to this general rule, and the sureties thereon, in respect to their liability for the default of the principal, seem to be classed with such sureties as covenant that their principal shall do a particular act. To this class belong sureties upon bail and appeal bonds, whose liability is fixed by the judgment against their principal. This distinction seems to be founded upon the terms of the obligation into which the sureties upon an administration bond enter, which are that their principal shall faithfully perform all the duties imposed upon him by the nature of his trust, and will account for and pay over all money which may come into his hands, pursuant to the orders and decrees of the probate court. The account must be rendered to and settled by the court, and the money must be paid out and distributed by and pursuant to the orders and decrees of the court, and the undertaking of the sureties is that their principal will do all this. * * * The condition of the bond in the present case is to the effect, 'that the said Backus shall faithfully perform all the duties enjoined upon him by law as such public administrator, and particularly that he will account for and pay over all moneys and property that may come to his hands as such administrator.' This means that he will account to the probate court, and will pay over to such persons, as such court may direct, all moneys and property of which he may become possessed in his official capacity; or, in other words, he will obey the orders and decrees of such court." The remedy of the surety, for an error in the judgment against his administrator, is by an appeal from that judgment. It is also said that the sureties on an administration bond differ from other sureties, as, for instance, from the sureties of a sheriff, in this, that the latter are liable to be sued in the first instance, with or without the sheriff, before anything has been determined as to the latter's default; while the former are not liable on the administration bond until a *devastavit* has been judicially determined, and that, this established, they will not be allowed to controvert the matter in the collateral action upon their bond: *Governor v. Shelby*, 2 Blackf. 29.

Such considerations have moved some courts to hold that in the absence of fraud or collusion, a judgment against an administrator which establishes his *devastavit* is conclusive against his sureties, both of the existence of the debt upon which it was obtained and of the *devastavit*: *State v. Holt*, 27 Mo. 340; *Salzer v. State*, 5 Port. (Ind.) 204; *Goodwin v. Wilson*, 1 Blackf. 344; *Ralston v. Wood*, 15 Ill. 347; *Williamson v. Howell*, 4 Ala. 693; *Ragland v. Calhoun*, 36 Id. 606; *Lamkin v. Heyer*, 19 Id. 232; *Garber v. Commonwealth*, 7 Pa. St. 265; *Stovall v. Banks*, 10 Wall. 588; *Willey v. Paulk*, 6 Conn. 76. Other courts have adopted a different view. They evidently do not consider the surety as undertaking that his principal shall obey the orders of the court, of whatever character, but merely that he shall faithfully discharge the duties of his office, and, therefore, hold that he is not, more than any other manner of surety, bound by the judgment against his principal: *Hobbs v. Middleton*, 1 J. J. Marsh. 184; *Armistead v. Harramon*, 4 Hawks, 341; *Iglehart v. State*, 2 Gill & J. 245; *Seat v. Cannon*, 1 Humph. 470; *Ordinary v. Wallace*, 1 Rich. 507.

These courts seem to consider a judgment against an administrator conclusive evidence against the surety of the existence of the debt, but allow him

to plead, notwithstanding a judgment establishing a *devastavit*, *plene administravit*, or no assets: *Hobbs v. Middleton*, 1 J. J. Marsh. 184; *Armistead v. Harramon*, 4 Hawks, 341; *Seat v. Cannon*, 1 Humph. 470; *Strickland v. Murphy*, 7 Jones, 346.

The rule in North Carolina has, however, been changed by statute, so as to make the judgment against the administrator conclusive evidence against his sureties. The cases last cited refer to cases of judgment obtained against the administrator upon debts due by his intestate, but it is not seen why their principles should not apply to decrees settling the accounts of the administrator, and finding balances due by him.

BLANEY V. RICE.

[20 PICKERING, 62.]

MORE OR LESS.—If in a deed a lot be described as running back eighty-five feet, more or less, these words may be deemed to have some meaning, so as not to fix the distance absolutely; and if the grantor soon afterwards makes and records a plat, in which the lot before granted is shown to be eighty-nine feet in depth, this is equivalent to fixing the back line eighty-nine feet from the front, and is conclusive upon him and those thereafter acquiring title under him.

WRIT of entry. The lands of demandant and tenant formerly belonged to Charles Bulfinch, and were situated between George and Charles streets in Boston. In January, 1807, Bulfinch conveyed to Silas Whitney, jun., a tract of land fronting westerly on Charles street sixty feet and running back eighty-five feet more or less. Whitney, in March of the same year, conveyed the north half of this tract to the demandant Blaney. In 1810, Bulfinch conveyed to Joy and others, four lots on George street, running back eighty feet, and bounded westerly by the lands of Whitney and Blaney. In the mean time, Bulfinch had made and recorded a plat of the lands between these two streets, and on such plat had represented the tract of Whitney and Blaney as extending back eighty-eight or eighty-nine feet, and the tract on George street as running back eighty feet only; and this plan was referred to in the deed to Joy and others under whom the tenant deraigned title. The tract in controversy was that lying eighty-five feet easterly from Charles street and eighty feet westerly from George street.

Bartlett and Loring, for demandant.

Fuller and Washburn, for the tenant.

By Court, SHAW, C. J. In construing the deed from Bulfinch to Whitney, bounding the estate on Charles street, and running back eighty-five feet, more or less, these words, "more or less,"

may be considered as having some meaning, so as not to fix the distance absolutely, though these words are often introduced without having practically any effect. The words of description, "eighty-five feet more or less," if there were nothing in other parts of the deed, or the subject to which it applies, to control or explain them, especially where the grant is of a parcel measured out of the grantor's own larger tract, would be equivalent to eighty-five feet absolutely. But the words "more or less" may be considered equivalent to a suggestion, that either there is some monument, abuttal, or line there, or as an intimation that one is intended to be placed there, to stand as the line intended, in place of the absolute admeasurement. The fact that Bulfinch, the grantor, soon after the execution of this deed, made a plan of this and the adjoining lots, and placed it on record for the information of all concerned, making these two lines described as eighty-five feet more or less, about eighty-eight or eighty-nine feet, is equivalent to the fixing of such line or monument, so far as his own rights and those claiming under him were concerned. It may be presumed to have been done by agreement, and in pursuance of the contract of sale; but without such presumption it would be conclusive of the intent of the grantor, in regard to the indefinite words used in his deed, and good against him and those claiming under him. This act being done by Bulfinch, before he conveyed any of the other lots, is sufficient to answer the rule of fixing a monument or abuttal soon after the conveyance.

But there is another view of the case which seems quite decisive. The subsequent deed of Bulfinch to the ancestor of the defendant, and that under which alone he can claim, described the lot as bounded on George street, and running back eighty feet, and there bounded on the land of Whitney and Blaney. The same deed referred to the plan then on record, and therefore the bound on the land of Whitney and Blaney, most naturally and obviously means, the land of Whitney and Blaney as designated and marked upon that plan, especially as such construction gave to the grantees the whole depth of eighty feet as mentioned in the deed.

The court are of opinion, that the demandant has established the better title to the narrow strip of land in question, and is entitled to recover it in this action.

WHERE A CONVEYANCE REFERS TO A MONUMENT not in existence, but the parties afterwards erect one, intending it as and for the monument described, it will be so deemed afterwards, as if it had been standing at the time: *Cleave-*

lund v. Flagg, 4 Cush. 81; and therefore such monument will govern the extent of the land, although not entirely coinciding with the line described in the deed: *Kellogg v. Smith*, 7 Id. 382. But a monument erected long after the transaction, by one of the grantees without notice to the grantors, will avail nothing: *White v. Bliss*, 8 Id. 511, citing the principal case. The case is also cited in *Block v. Pfaff*, 101 Mass. 539, and *Mann v. Dunham*, 5 Gray, 515.

LOVELL v. MINOT.

[20 PICKERING, 116.]

LOAN BY GUARDIAN on borrower's note, secured by pledge of stock in a manufacturing company at three fourths of its par and less than three fourths of its market value, is an investment justified by sound discretion, and the guardian will not be held responsible for a loss resulting from a subsequent depreciation in the value of the stock.

SALE BY GUARDIAN ON CREDIT, of shares in a corporation, for which he takes purchaser's note secured by two indorsers, and also the note of another person secured by a mortgage on real estate, will be deemed to be in good faith and in the exercise of a sound discretion, and he will not be required to make good any resulting loss.

APPEAL from decree of probate court. Minot, guardian of Elizabeth M. Gayetty, on July 18, 1825, lent one thousand three hundred and thirty-three dollars and thirty-three cents of her moneys, and upwards of two thousand dollars of the moneys of her minor brother, also under his guardianship. He took the borrower's note, secured by five shares of the Nashua Manufacturing Company, for one thousand dollars each and then worth more than par in the market. Other persons made loans on like security about the same time. The borrower became insolvent and the shares depreciated so as to become inadequate security. In March, 1833, the guardian for one hundred and one dollars and forty cents bought twenty-eight one hundredths of a share in the same company, to enable him to give Elizabeth two whole shares as her portion of the five. In November of the same year, the guardian sold two shares to H. H. Fuller for two thousand dollars, taking, to secure payment, two notes for one thousand dollars each, indorsed by R. L. Porter and E. Fuller; also four notes of D. Young to E. Fuller, aggregating two thousand and eleven dollars, which last notes were secured by real-estate mortgages on lands in Lowell. After this sale the stock rose to eight hundred dollars per share. All the makers and indorsers of the notes taken on account of the sale of the stock failed, and the land embraced in the mortgages was not adequate to secure payment. The ward Elizabeth having inter-

married with Wm. S. Lovell, he claimed that her guardian ought to pay over the amount of moneys received and interest. The latter sought to exonerate himself by tendering an assignment of the notes and securities. The probate court decreed in favor of the guardian.

E. Hersey Derby, for the appellant.

S. Hubbard, for the appellee

By Court, SHAW, C. J. The merits of this case depend upon the question, whether the loan to an individual upon his promissory note, with a pledge of shares in a manufacturing company as collateral security, was a suitable and proper investment for a guardian to make, or whether it was so unsuitable as to make the guardian personally responsible for the loss.

It is not suggested in the facts, nor in the argument, that any neglect or want of good judgment was chargeable to the respondent, other than what may be inferred from the fact of making such an investment. The rule claimed by the appellant, that no investment can be considered safe or can be approved by a probate court or court of equity, except in public securities, however well supported by authorities, as a rule established in English courts of equity, is wholly inapplicable to this country, and untenable. In fact there are no public securities in this country, which would answer these requisitions of an English court of equity. The rule was well laid down in *Harvard College v. Amory*, 9 Pick. 461, that "all that can be required in such cases is, that the trustee shall conduct himself faithfully, and exercise a sound discretion;" and by this rule the court are of opinion, that the present case must be governed. Such is the variety of stocks and funds, including loans on mortgages, in which prudent and discreet men make investments, and those intended to be, to a considerable degree, permanent, and such is the fluctuating character of all funds that it seems difficult if not impossible to lay down any rule, at once just and practicable, and broad enough to meet all the cases. See *Case of Calhoun's estate*, 6 Watts, 185; *Knight v. Earl of Plymouth*, 3 Atk. 480; *Thompson v. Brown*, 4 Johns. Ch. 628.

Taking this to be the rule, the court are of opinion that the guardian acted in good faith, and with sound discretion, in making the investment which he did. He took the note of a person, then in good credit, with a pledge of stock as collateral security, at the rate of about three quarters of its par value, and less than three quarters of its market value.

It was objected that this was an injudicious and indiscreet investment, because it exposed the funds to the risks and hazards of trade, and the rule was cited and relied on, that if a trustee puts the trust fund into trade, he shall account for the profit if any is made, and shall make good the capital, if any portion of it is lost. There would have been more ground for this argument, had the money been invested in the manufacturing stock, in which case the profits would have been contingent. But it was not so; it was a loan at a fixed interest of six per cent., and the transaction no further exposed the capital to the hazards of trade, than as it affected the value of the pledge. But at the rate at which these shares were taken as collateral security, there was room for great fluctuation, and they might fall twenty-five per cent. without leaving the loan insecure. The subsequent transaction in the sale of these shares, is open to the same considerations; it was conducted with good faith and sound discretion, and though, as events turned out, in consequence of the failure of the purchaser, and of his two indorsers, and of the debtor on the mortgage given for collateral security, it would have been better and for the interest of the ward, if the shares had not been sold, yet this could not be foreseen, and is no proof of negligence or want of sound discretion.

The court are therefore of opinion, that there was no error in the decree of the probate court, allowing the respondent's charge of one thousand three hundred and thirty-three dollars and thirty-three cents as cash invested, and in this respect, the decree of that court is affirmed.

RULE WITH RESPECT TO INVESTMENTS OF GUARDIAN is merely that he must exercise good faith and a sound discretion in the investment of the trust funds; and if he do this he will be exempt from liability for the consequences that may follow the investment: *Clark v. Garfield*, 8 Allen, 427; *Kinmouth v. Brigham*, 5 Id. 277. To the same effect see *Konigsmacher v. Kimmel*, 21 Am. Dec. 374. But the guardian can seldom loan the ward's funds, without taking security, and yet be safe: Id., and note, page 381. If the guardian deposits the ward's funds in his own name, however reputable the bank at the time of the deposit, he will be liable for the loss of the funds by the subsequent failure: *Jenkins v. Walter*, 29 Id. 539.

GRAY v. BARTLETT.

[20 PICKERING, 186.]

WHARF EXTENDED BELOW LOW WATER gives no right of possession to any adjacent land under water not actually covered by the wharf, nor any right to the exclusive use of the open space at its side. The only right of the wharf-owner over the adjacent water is that which he has in common

with all others, of mooring vessels upon it or passing and repassing with boats and vessels engaged in navigation.

WHERE LANDS ARE UNDER LOW-WATER MARK, title is not to be acquired by prior occupancy, while they are part of the public domain.

OWNER OF FLATS, COVERING THE WHOLE THEREOF WITH A WHARF, does not thereby make such a claim of right to use the land of a coterminous proprietor to lay vessels upon, as will ripen into a prescriptive right to use such land, although the adjacent proprietor acquiesces in the maintenance of the wharf.

ESTOPPEL—ONE STANDING BY AND SEEING ANOTHER making large expenditures on property, to which he has some claim of which he gives no notice, can not afterwards assert his claim. But this principle does not apply where the expenditures are made upon the public domain or upon the lands of the person making them; for then, third persons have no right to object.

BILL for injunction. John May, in 1826, being the owner of a wharf in Boston, extended it some ten feet below low-water mark, and afterwards, in the year 1816, his title was conveyed to plaintiff's father, who in the year last named extended the wharf still further below low water, at great expense. Samuel Parkman, at the time of these extensions, owned the adjacent wharf. The elder Gray died in 1825, devising his property to his sons. The defendant having acquired Parkman's title, proceeded to extend his wharf below low-water mark and intended to continue it still further. This the plaintiff sought to enjoin. He insisted that the defendant's predecessors had acquiesced in the extension of plaintiff's wharf, and seen large expenditures made therein; that the extensions made and intended by defendant greatly injured plaintiff's dock and would render it useless. The jury, in response to special issues presented to it, found that plaintiff at the time he extended his wharf below low-water mark had no right to do so, but that he now has a right thereto by the statute of 1837, so far as it does not infringe on the direct line of defendant's premises; that the extension of plaintiff's wharf injured defendant; that the defendant had the right to extend his wharf, so far as plaintiff was concerned; that Parkman had knowledge of the extension of plaintiff's wharf and did not object thereto.

Mason and Gray, for the plaintiff. As against the public, plaintiff has the right to use the wharf, and as appurtenant thereto, the dock: 1. Because it is not an impediment to navigation: *Angell on Tide Waters*, 127, 132, 156; 2 *Dane* Abr. 696, 697; *Commonwealth v. Wright*, 6 Am. Jur. 185. 2. By Rev. Stat., c. 119, sec. 12, and Stat. 1837, c. 229; *Jackson v. Harden*, 4 Johns. 202 [4 Am. Dec. 262]; *Smith v. Lorillard*, 10 Id. 338; *Cutts v.*

Spring, 15 Mass. 135. As against defendant the plaintiff has acquired an easement to keep and maintain his dock free from obstruction; because the dock is appurtenant to the wharf, and without it the wharf is of no value; and because the defendant and his predecessors acquiesced in the acts of plaintiff and his predecessors and thus permitted an easement to be created. *Kent v. Waite*, 10 Pick. 138; *Doae v. Broadstreet Association*, 6 Mass. 332; 1 Story Eq. 376, 378; *Hicks v. Cooke*, 4 Dow. 16; *East India Co. v. Vincent*, 2 Atk. 83; *Taylor v. Hampton*, 17 Am. Dec. 710; *Tarrant v. Terry*, 1 Bay, 239; *Whalley v. Thompson*, 1 Bos. & Pul. 371.

Aylwin and Loring, for the defendant. Plaintiff had no right to extend his wharf below low-water mark: Colonial Ordinance of 1641; Ancient Charter, 148; *Commonwealth v. Charlestown*, 1 Pick. 184 [11 Am. Dec. 161]; *Commonwealth v. Chapin*, 5 Id. 201; *Attorney-general v. Johnson*, 2 Wils. Ch. 101; *Stoughton v. Baker*, 4 Mass. 528 [3 Am. Dec. 236]. The defendant is willing to let the wharf stand except where it projects over his line. The statute of 1837 does not confirm plaintiff's rights; but merely remits the right of the state to prosecute him for maintaining a public nuisance: *Charles River Bridge v. Warren Bridge*, 7 Pick. 444. The doctrine of estoppel does not apply: *Attorney-general v. Baliol College*, 9 Mod. 411; *Plumb v. Fluit*, 2 Anst. 432. That plaintiff's use of the dock in front of his wharf had not been adverse nor exclusive, nor had it continued sufficiently long to give an easement: *Sargent v. Ballard*, 9 Pick. 251; 1 Story Eq. 391, 394; *Kenney v. Browne*, 3 Ridgew. P. C. 518, 519; *Elliotson v. Freetham*, 2 Scott, 174. The defendant is entitled to extend his wharf to the line of the harbor as defined by the statute of 1837.

By Court, SHAW, C. J. It appears to the court very clear, that the extension by Mr. Gray, the plaintiff's ancestor, in 1816, of his wharf into the channel below the line of low-water mark, whether it was a public nuisance or not, or whether in any form the public could have interposed to prevent or remove it, gave the builder no possession, and no color of title, beyond the limits of the land under water, actually covered by some erection which would in fact exclude the use of the public waters to others. Of course it did not draw after it any exclusive right to the use of the open space by the side of it, for the purposes of wharfage, by way of easement as appurtenant to his wharf. Beyond the limits of his actual occupation, by building, the plaintiff's ancestor had a right, in common only with all others, to use

the space on both sides of his wharf, for the purposes of passing over it with boats and vessels, and for mooring vessels upon, as all persons have a right to use open navigable waters.

The principle of prior occupancy by Mr. Gray, the ancestor of the plaintiff, and the acquiescence of the ancestors of the defendant, does not apply to any part of the premises in controversy, below low-water mark, because, as to that the possession was not adverse, and Mr. Parkman, the defendant's ancestor, had no power to oppose or resist it. It was a public domain, over which Mr. Parkman had no control; and his right to use it, was a right in common with all the rest of the community, and one which it was not his peculiar duty or province to vindicate.

A point mainly relied on is this, that when the elder Mr. Gray extended his wharf within and beyond low-water mark, which was a great public improvement, he covered the whole width of his flats, or nearly the whole, with his wharf; that it was essential to the enjoyment of his wharf, that he should make use of the adjoining flats for dockage; and that the adjoining proprietor must have known and understood this, and by his silence tacitly acquiesced in this claim, and gave him permission so to occupy the adjoining flats. But the court are of opinion that this is making much too broad a claim, upon the foundation of tacit acquiescence. When Mr. Gray built out his wharf from high to low-water mark, he had a right to use and occupy his own flats to the full breadth, in any manner which he thought fit. He might use the flats solely for wharf or solely for docks, or partly for one and partly for the other. But he could not use the same flats for wharf and for docks at the same time. If therefore it was his intention to use the sides of his wharf, or either of them, for dockage to lay vessels upon, it was in his power to leave open a sufficient part of the flats for that purpose, and for access to them. His not doing so, was rather an indication that it was not his intention to use the sides of the wharf to lay vessels at, but only the end. At all events, it did not amount to the claim of a right, to use the land and flats of the coterminous proprietor to lay vessels upon, without any title by grant or prescription; and therefore the silence of the coterminous proprietor is no evidence of his tacit acquiescence in such a claim. At most it can amount to no more than evidence of the consent of such co-terminous proprietor, that the party may so cover his flats, with his wharf, if it suits his interest or choice to occupy it as wharf rather than as a dock.

The principle was much relied upon, that where one stands by

and sees another laying out money and making large investments upon property, to which he himself has some claim or title, and he does not give notice of it, he can not afterwards, in equity and good conscience, set up such claim or title. This we think is a very just and well-settled principle, when well understood and properly applied. But it does not apply to this case, because the acts of Mr. Gray did not tacitly or expressly amount to any claim upon the property or rights of the coterminous proprietors, whose estate the defendant now holds; but were either such as he had a right to do, within the exercise of his own rights, upon his own flats, or were done upon the public domain, against which those proprietors could make no legal resistance. Besides, the principle insisted on requires some qualification, and can be only held to apply against one who claims under some trust, lien, or other right not equally open and apparent to the parties, and in favor of one who would be deceived or misled by such want of notice. But where the act of one is an encroachment on the soil or rights of another, an acknowledged tort, equally well known, or equally open to the notice of both parties, it gives no right, until it has continued for such a length of time without interruption, as to found the presumption of a grant, or give effect to the limitation of the right of action for the disturbance, as determined by common law or by statute.

In this suit, it must be remembered, that the plaintiff seeks to enjoin and inhibit the defendant from building out and extending his own wharf, within the limits of his own original lines, and upon an extension of those lines to low-water mark, a claim which in the opinion of the court can not be maintained. But this opinion is not intended to affect in any respect, the rights of the parties to a small triangular piece, covered by the wharf of the plaintiff at the north-west corner thereof. That portion of the wharf, as appears by the plans used at the hearing, lies west of the line of the plaintiff's flats, as extended from the shore to low-water mark, and lies upon that part of the land below low-water mark which lies in front of the defendant's land. It is land originally below low-water mark, a part of the public domain, and owned by neither of these parties. No claim is made for it, in this suit, by the defendant, and the only point open, and the only one to which this opinion applies, is, that the plaintiff has established no right, for the purposes of dockage, to that portion of the flats lying west of the original line of his own flats, and over the lands and flats which would be covered by the defendant's wharf, if extended in like manner.

Plaintiff's bill dismissed, with costs.

ESTOPPEL.—Where an owner of property has failed to give notice of his right to persons who are about to buy under a mistaken opinion as to the title, he will not be estopped from asserting his title against the purchaser, unless he was likewise instrumental in causing or encouraging the mistake: *Bragg v. Boston & N. R. R. Co.*, 9 Allen, 62; and it can not be ruled as matter of law, that the claimant under an unrecorded deed has estopped himself from asserting title by witnessing a subsequent deed made by his grantor, if the grantee therein at the time knew of the prior unrecorded deed: *Hale v. Skinner*, 117 Mass. 475, citing the principal case. If the conduct of the owner of land has been such as to encourage a third party to make improvements thereon, equity will compel him to surrender his title on receiving compensation, or else to pay for the improvements; but mere silence on his part will not entitle to relief against him, if the person making the improvements was fully aware of the situation, or had the means of becoming so: *Crest v. Jack*, 27 Am. Dec. 353, and note 355.

ADVERSE ENTRY will not be constituted by an acquiescence in any act of entry or possession, if there was no right to complain: *Drake v. Curtis*, 1 Cush. 418, citing the principal case. As to what shall constitute adverse possession, see *Smith v. Hosmer*, 28 Am. Dec. 354, and note.

PRIVATE OWNERSHIP OF FLATS is subject to a public right of way thereover for boats and vessels, that the owner can not lawfully impede by erections or inclosures: *Commonwealth v. Alger*, 7 Cush. 79.

BOWEN, ADM'X, v. HOPE INS. Co. BOWEN, ADM'X, v. MERCHANTS' INS. Co.

[20 PICKERING, 275.]

SAILING ON HER VOYAGE is accomplished when an insured vessel quits her moorings, in readiness for sea and intending to sail, though she is afterwards stopped by head winds.

VESSEL IS AT SEA when, being at Bangor, Wales, on east side of the straits of Menai, ready and intending to sail, she drops down seven or eight miles below Bangor for the purpose of proceeding on her voyage, but is then detained by head winds and compelled to come to anchor and remain several days.

VESSEL IS "ON A PASSAGE" when detained under the circumstances detailed above, and is within a policy of insurance which purports to continue her insurance if she should be "on a passage" at the expiration of the year for which she was insured.

ACTION on policies of insurance on the brig Governor Brooks. On September 25, 1835, the brig was at Bangor, on the east side of the straits of Menai, which are between Wales and the island of Anglesea, with her cargo on board and ready for sea. With the intention of proceeding on her voyage to Boston, she weighed anchor and dropped down several miles; she was stopped by head winds and was not able to get out of the straits. She set sail on several successive days afterwards, but was unable to

proceed until the eighth day of October. She then got to sea, where in the progress of her voyage she sustained damages. The first policy was for one year from October 6, 1834, but if the vessel should be at sea at the end of the year, the risk should continue until she reached her port of destination. The second policy was like the first, except that the words "on a passage" were used instead of the words "at sea." The only question was whether the brig was in harbor, or "at sea," or "on a passage" on the sixth day of October, 1835. The jury found for plaintiff.

Loring and Loring, for the plaintiff.

Parsons and Stearns, for the defendants.

By Court, SHAW, C. J. The policy in the first of these cases was on time, for one year, and if the vessel should be at sea when the year expired, then the risk was to continue until her arrival in port, at a *pro rata* premium. The loss occurred after the expiration of the year, and the question is, whether the risk continued, upon the contingency stated, within the meaning of the policy. The term at sea may have different meanings, according to the connection in which it is used. Here it is used in contradistinction to arrival in port. If the vessel has sailed or commenced a voyage from one port to another, she must be considered to be at sea, within the meaning of this clause, from the commencement to the termination of that voyage, although during parts of it she may have sought shelter in a place on the way. Then what is a departure on a voyage, and what an arrival, must be settled by the law and usage as established in reference to cases where the termini of the voyage, and not periods of time, determine the commencement and termination of the risk. The law upon this subject seems to be well settled, that when a vessel quits her moorings, in complete readiness for sea, and it is the actual and real intention of the master to proceed on the voyage, and she is afterwards stopped by head winds and comes to anchor, still intending to proceed as soon as wind and weather will permit, this is a sailing on the voyage within the policy: *Bond v. Nutt*, Cowp. 601; *Lang v. Anderson*,¹ 3 Barn. & Cress. 495; *Pettigrew v. Pringle*,² 3 Barn. & Adol. 523.

In an early case in this commonwealth, it was held, that under a similar clause, a vessel might be deemed "at sea," whilst on a foreign voyage, though at the time the vessel was actually in port, having been captured, carried in, and detained: *Wood v. New England Mar. Ins. Co.*, 14 Mass. 31 [7 Am. Dec. 182].

1. *Lang v. Anderson*.

2. *Pettigrew v. Pringle*.

In the present case, the court all are of opinion, that upon the facts proved, the vessel had left her moorings and commenced her voyage, when she left the city of Bangor, where she had taken her cargo, with a full purpose of prosecuting her voyage, and fully prepared for sea, and that she was therefore at sea within the meaning of the policy, on the sixth of October, when the year expired; and then by force of the clause cited, the policy continued until the loss occurred. In the other policy, the contingency upon which the risk is to continue at the end of the year, is a little differently expressed, the words being, if the vessel shall then be "on a passage." We think the meaning and legal effect are the same in this as in the other policy. A vessel is on a passage after she has left her port of lading, fully prepared to proceed to her port of destination, and with a real intent to do so, although she comes to anchor again on account of head winds, and the intention of proceeding as soon as wind and weather will permit is not relinquished.

The court are of opinion, that the plaintiff is entitled to recover in both cases, and that an assessor must be appointed, conformably to the agreement of the parties, to ascertain the amount of loss.

THE VOYAGE OF A VESSEL to her port of ultimate destination begins as soon as she leaves the home port destined for that place, and can not be considered a voyage to an intermediate port at which she intends to stop to take on the stores necessary to enable her to continue her voyage to such place of ultimate destination: *Friend v. Gloucester Ins. Co.*, 113 Mass. 332, citing the principal case.

A VESSEL IS NOT ON HER PASSAGE within the meaning of a policy which continues the risk if she is at sea at the termination of the period of time embraced by the policy, if at the termination of that period she is at a place to which she is sent to take cargo, though that place is not a port by law but an open roadstead: *Cole v. Union Ins. Co.*, 12 Gray 501; and see *Washington Ins. Co. v. White*, 103 Mass. 238, both distinguishing the principal case.

A VESSEL IS TO BE CONSIDERED "AT SEA" within the meaning of a policy of insurance which insures her for a specified time, and provides that if she should be "at sea" at the expiration of that time, then the risk is to continue at an agreed premium until she reaches her port of discharge, if at the expiration of the term she is in a foreign port, having been captured and carried thither against the will of the master: *Wood v. New England Mar. Ins. Co.*, 7 Am. Dec. 182.

WHITNEY ET AL. v. GODDARD, ADM'X.

[20 PICKERING, 304.]

THE TERM PERSON "BEYOND SEA, WITHOUT ANY OF THE UNITED STATES" does not include a citizen of another state, who has never been in this. Such a citizen is therefore not within the exception of the statute of limitations of 1786, c. 52, sec. 4.

ASSUMPSIT on a contract made by plaintiffs in May, 1829; they then resided in New York. It was not shown that they were ever in Massachusetts. The defendants resided in Boston. This action was commenced May 24, 1837. The defendants pleaded the statute of limitations.

Brigham, for the plaintiffs.

Hubbard and Watts, for the defendant.

By Court, SHAW, C. J. It is somewhat remarkable, that this precise question has not before been brought under the consideration of the court, especially as it is one which would be likely to be of frequent occurrence. The precise question is, whether a citizen of another of the United States, who has never been within the limits of this state, is barred of his action in six years from the time the cause of action accrued, by the statute of limitations, stat. 1786, c. 52. It depends upon the construction of the statute, and upon the point, whether a citizen of another of the United States is within the statute, or within the exception. The exception and saving provision is thus expressed, sec. 4: "This act shall not be understood to bar any infant, *feme-covert*, person imprisoned, or beyond sea, without any of the United States, or *non compos mentis*," etc. Upon the construction of this statute, the court are of opinion, that the plaintiffs, being citizens and inhabitants of the state of New York, are not persons beyond sea without any of the United States, and therefore that they are not within the saving clause of the statute, and therefore by its general provisions, they are barred from maintaining this action.

Several cases have been cited from other states, in which it has been held that the words "beyond seas" have been construed to mean, beyond the limits of the state, passing the act. These cases we do not deem applicable to the present, because the words of the statutes construed are different from ours, in using the words "beyond seas" alone and without explanation. We think it quite apparent, why a construction so widely different from the ordinary and literal meaning of the words "be-

yond seas," should have prevailed and been deemed reasonable. Prior to the revolution, several of the North American provinces and colonies had adopted and re-enacted the statute 21 Jac. I., being the statute for the limitation of personal actions. In re-enacting the acts of parliament for the benefit of the colonies, there was a natural and strong tendency to follow as nearly as possible, their precise language, as well from a natural deference which was felt for acts of British legislation, designed and intended as an amelioration of the common law, affecting civil rights and the administration of justice as from the more important and practical consideration, that such statutes, if of considerably long standing, came to us recommended by a long course of sound and wise judicial expositions, explaining doubts, reconciling apparent contradictions, removing ambiguities, and thus fitting them for a better practical application to use, in regulating the rights and remedies affected by them. This latter advantage could only be attained by following the language as well as the spirit of such acts of parliament. The effect of this tendency was, many times, to follow the language of English legislation, where from the difference in the circumstances of the two countries, such language was singularly inapplicable. This accounts for the use of the clause "beyond seas," in the acts of many of the states. In Great Britain, after the union with Scotland, when this language was introduced, it had an apt and precise signification, being co-extensive with the realm, that is, with the jurisdiction of the parliament which adopted it. There was therefore good ground for courts of the colonies and states who had thus adopted the language of 21 Jac. I., to hold the words "beyond sea" to be equivalent to the phrase "out of the state;" because such was its legal effect and construction, in the original act. It has been stated that the statute of Virginia adds the words "without the limits of the commonwealth," to the words "beyond sea," to make it more explicit: *Shelby v. Guy*, 11 Wheat. 368.

But in our statute, the words "beyond sea" do not stand alone, they are immediately followed by the words "without any of the United States." We are of opinion, that in the use of these words the legislature did not intend to point out two distinct disabilities, that of being beyond sea, as one, and that of being without any of the United States, as another, using the former in a technical sense as equivalent to "out of the commonwealth," because it would render the words "without the United States" not only superfluous but repugnant. It may then be asked, why

the words "beyond sea" are used at all, being wholly superfluous, upon the construction which the court now adopt. It may be remarked in passing, that in the revised statutes, these words are not retained, the words are simply "absent from the commonwealth:" Rev. Stat., c. 120, sec. 6. But we think an answer may be given to the question, why this clause was inserted. The act of 1786 was not an original act of legislation. It was, like most of the statutes of that period, a revision of several provincial acts. It seems to have been the practice of legislators, soon after the adoption of the constitution of 1780, in the revision of colonial and provincial laws, to retain the form and phraseology of former acts as far as practicable. Probably this was done for the reason already given, that these acts had received judicial constructions, many titles and rights depending upon them, and these would be more stable and secure, if the form and language of former laws should be retained, where it was not intended to change the substance.

It is a matter of doubt, whether the several laws for the limitations of personal actions passed by the provincial government, ever went into operation. They were altered, modified, and suspended from time to time, till after the commencement of the revolution. But whether they actually went into operation or not, is immaterial; they stood on the provincial statute book, and would be naturally resorted to, as other similar provincial acts were resorted to, upon a revision of the statutes, after the adoption of the constitution.

The first provincial act was that of 13 Geo. II., Ancient Charters, 521. The saving proviso, in that act, is almost precisely in the same terms with the statute of 1786; except that the words "beyond the seas" are alone used. This act is stated in a subsequent one, to be in a great measure copied from 21 Jac. I., and 22 Geo. II., Anc. Charters, 566. This latter act contains the same proviso, not to bar any person "beyond the seas." Thus stood the provincial acts, when the statute of 1786, which, in its phraseology, is manifestly a revision of the former acts, was passed. The saving clause or exception is the same, except that immediately after the words "beyond sea" are added the words "without any of the United States." The latter words are put by way of explanation and qualification of the preceding, equivalent to saying, that by these words, "beyond sea," we mean without the United States. The former phrase was probably used, because it was found in the previous acts; and the latter was added to remove the doubt and ambiguity which attended it as it stood alone.

There seems also to have been good reason why the citizens of other states should, in this respect, be put upon the same footing with those of our own state. The constitution of the United States, adopted about the time that this act went into operation, recognized the citizens of all the United States as constituting, for many purposes, one people, and it provides, that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. The citizens of other states, therefore, have all the same means and facilities for securing and recovering their debts as citizens of the commonwealth, and that not merely as a matter of comity, but of right. There seems to be equal reason, therefore, why they should conform to the general policy of the law, and be required to commence their suits within the times limited by its provisions.

A case was cited in which, it was supposed, that a contrary opinion had been expressed: *Bulger v. Roche*, 11 Pick. 36 [22 Am. Dec. 359]. In that case, no question upon this point was involved, because both parties were foreigners and British subjects. One or two expressions, however, in the opinion of that case, given by myself, countenance the idea, that by the construction of our statute, the terms "beyond sea," and "out of the commonwealth," were used as synonymous, and that an inhabitant of another state would not be barred. The sentence alluded to is this: "This proviso in terms excludes the operation of the statute in all cases where the plaintiff is out of the commonwealth at the time the cause of action accrues, without distinguishing," etc. The object of the sentence was to show, that there was no distinction between a foreigner, a Chinese or Englishman, for instance, and a former citizen who had gone abroad. It meant to say, that the terms or words of the statute applied as fully to the one as the other; to those who were in fact absent, beyond sea, etc., whatever these expressions imported, and not merely to those who had gone beyond sea, or were described by any other expression, implying a former presence or domicile. There was no occasion to mark the distinction on which this case turns. Had the words of the statute been used, "beyond sea without any of the United States," which would have been more exact, the mistake would not have occurred; and the result upon the point then under consideration, would have been precisely the same. A subsequent expression in the same opinion, that the remedy would not be barred until six years after both plaintiff and defendant had been within the jurisdiction of the commonwealth, must be accounted for in the same way, by haste and

inadvertence. The proposition was substantially correct as applied to that case. Both plaintiff and defendant were foreigners, never having been citizens of any other of the United States. The proposition intended to be expressed was, that the statute of limitations would not be a bar in such case, until the defendant had been within the state and liable to be sued, for the term of six years, and the plaintiff had been six years freed from the impediment, as it was contemplated in the statute, of being beyond sea, etc., which liberation, in that case, commenced at the same time that the plaintiff came into this commonwealth. It was therefore correct as applied to that state of facts, that the plaintiff would not be barred, until he had been six years within the jurisdiction of the commonwealth.

This case therefore affords no authority for the ground taken by the plaintiffs; and the court are of opinion, that the plaintiffs, being citizens of the state of New York, are not within the exception, and that they are barred of their action by the statute of limitations.

THE TERM "BEYOND SEA," in a statute of limitations has generally been considered to mean out of the state: *Forbes v. Foot*, 13 Am. Dec. 732, and note in which the different authorities are collected.

MARTIN v. THE FISHING INSURANCE COMPANY.

[20 PICKERING, 389.]

INSURANCE—WHAT IS A WARRANTY.—Stipulation in a policy on a vessel that the insurers are not to be "liable for any damage to or from her sheathing" is not equivalent to a representation that the vessel has sheathing; but even if it were, the representation is immaterial, if it appears that sheathing would be regarded as of no benefit to the vessel.

INSURANCE ON VESSEL "AT AND FROM CALAIS, MAINE, ON JULY 16, to, at, and from all places to which she may proceed in the coasting business for six months," attaches on the day named, whether the vessel was then prosecuting her voyage or not, if it appears that the intent was to insure for a stated time, irrespective of the place where the vessel happened to be.

WAIVER OF PRELIMINARY PROOFS MAY BE PRESUMED in an action for insurance, if the insurers always declined to pay on some other ground, and had never objected on account of any defect or deficiency in the preliminary proofs.

PRESUMPTION OF SEAWORTHINESS DURING THE ENTIRE RISK arises from proof of seaworthiness at its commencement.

INSURANCE FOR WHOM IT MAY CONCERN, was effected by L. and made payable to himself. He was then the owner of one half of the vessel and had indorsed notes given for the purchase money by his co-owner. His

object was to indemnify himself from loss for this indorsement. Afterwards his co-owner gave L. a bill of sale. Still later a loss occurred. It was held that L. was entitled to recover the whole amount of the loss. **INTEREST AT THE TIME OF THE LOSS** is all that is required to entitle plaintiff to recover on a policy issued and payable to him "for whom it may concern."

ASSUMPSIT on a policy of insurance, "on the brig Helen, at and from Calais, Maine, on the sixteenth day of July, at noon, to, at, and from all ports and places to which she may proceed in the coasting business, for six months, ending the sixteenth day of January, 1836, at noon, the company not to be liable for any damage to or from her sheathing." The various points, and the facts necessary to illustrate them, appear from the opinion. There was a general verdict for plaintiff.

Loring, Hubbard, and Watts, for the defendants.

Choate and Crowninshield, for the plaintiff.

By Court, PUTNAM, J. The loss alleged in this case is admitted, or not denied; and several objections have been made to the payment of it by the defendants, which will now be considered. No fraud on the part of the plaintiff is suggested; no concealment is pretended. It was insisted for the defendants, that there was a warranty that the vessel was sheathed. The words in the policy which are relied upon are, the "company not liable for any damage to or from her sheathing." The report thus states this part of the case: "It being proved that the vessel was not sheathed at the time of the loss, the defendants' counsel objected that the plaintiff had not made out his case in this particular, the plaintiff, at the time of making the insurance, having represented, that she was sheathed, and the description of the vessel in the policy being a warranty, the fulfillment of which was essential to his right to recover, and which he was bound to prove." The case also finds, that there was no other representation upon this matter, excepting that which has been cited from the policy.

If it is to be considered as a representation, and the defense put on the ground, that it has not been complied with, we think it can not prevail; for it is evidently touching a matter not material. The report states, that there was evidence in the case tending to show, that sheathing is not considered of advantage to a vessel in the coasting trade, which was the employment in which this vessel was engaged. And the clause was introduced evidently with another intent than to be a warranty, in the strict meaning of that term in the law of insurance. It was intro-

duced for the protection of the defendants against the risk of loss for damage which might happen to the sheathing, which, as the report states, one of the directors of the company had examined when the vessel was in Boston, two or three weeks before the insurance, when it was found not to be very good. Now the defendants were unwilling to be subject to any loss on account of that old sheathing. It is not to be considered a warranty, any more than the clause which provides that the underwriters shall not be liable for any loss upon grain, etc., would be a warranty that the cargo consisted wholly or partly of grain, or than a stipulation that the defendants would not be liable for any damage to the stern boat, if suspended from the stern davits, would amount to a warranty to carry a boat astern.

And it was further argued for the defendants, that there was no evidence that the vessel was at or prosecuting her voyage from Calais on July 16, according to the terms of the policy. We think the decision in *Manly v. United Mar. and Fire Ins. Co.*, 9 Mass. 85 [6 Am. Dec. 40], a good answer to this objection. There an insurance was made upon a vessel for one year, commencing the risk at B. on a day certain at noon; in fact, however, the vessel had left the port of B. the preceding day, but was in good safety at sea on the day fixed, and was afterwards lost within the year; and the underwriters were held liable. Sewall, J., who was a very able commercial lawyer, gave the opinion for the court, and very properly observed, that the policy was made not with any distinct view to place, but merely regarding time. That case affords an illustration of the doctrine of warranty. If the intent of the parties was, that the policy was to attach on condition that the vessel was at B. on the day named, and that the risk should begin there, excluding every other place, then the policy never attached. But the court held, that the intent was to commence the risk on a day certain, and that the intent to insure at B. was not exclusive of any other place. It is a material fact in that case, and in which it is similar to the case at bar, that when the policy was made, neither party knew when the vessel sailed from the port named; and it was the clear intent of the parties to insure on time, without regard to the place where the vessel might then be, but with regard to the employment in which the vessel was engaged, viz., in the coasting trade. This objection, we think, can not prevail.

It was then objected, that no evidence was offered of any preliminary proof before bringing the action, excepting an abandonment which was not accepted, and a demand of payment of the

loss, and a written agreement of reference, and the testimony of one of the plaintiff's witnesses, that the defendants had always resisted the right of recovery, on account of the unseaworthiness of the vessel. But the report finds that there was no evidence, that the defendants, in their communications with the plaintiff, made the want of proof a ground of their objection to pay the loss claimed. And the court very properly left it to the jury to determine, whether the defendants had not waived their right to any further proof, or whether it was not evidence, that they had such proof. We all think that direction was right, and are satisfied with the result expressed by the opinion of the jury, for the plaintiff, as to that part of the case.

Then it was contended, that the vessel was unseaworthy, in respect that her chain cable was too short. Now the report finds, that in June previous to the date of the policy, the vessel was at Boston, and that she was then equipped with chain cables of sufficient length; that she sailed from New York for Boston on December 13, and was wrecked on the fifteenth, and came into Newport on the twenty-fourth; and that soon after her arrival she had but forty-nine fathoms of chain cable, which was confessedly insufficient to render her seaworthy, there being no evidence as to the time when the deficiency in the chain happened, although there was evidence tending to show, that there was sufficient when she sailed from New York. The question was, when the deficiency took place. The legal presumption was properly stated to the jury on this point, that if they found the vessel was seaworthy when the policy attached and the risk commenced, she so continued. The part of the cable might have been purloined at Newport. At any rate, there was no evidence introduced by the defendants to rebut the presumption of the law before stated, as to seaworthiness, or to show that there had been any neglect properly attributable to the plaintiff in that respect.

But the most material objection remains to be considered, viz.: whether the plaintiff is entitled to recover for more than one half of the vessel. It is to be recollected, that the defendants caused the plaintiff, for whom it might concern, payable to him, to be insured the sum contained in the policy. Now it is contended, that the title to one half of the vessel was in one Lamson, when the policy was made, and that he sold out his half before the loss, and so had no interest at the time of the loss; and so by the adjudication in *Carroll v. Boston Mar. Ins. Co.*, 8 Mass. 515, Lamson could not recover, nor could the

plaintiff recover for the use of Lamson, or of his assignee, who became such without the assent of the defendants. The plaintiff has proved the loss, and he now claims to recover in his own name, for account of whomsoever the loss concerned. The money, by the terms of the policy, was to be paid to him. But it was to be paid only to those who were interested at the time of the loss; for they only, in legal contemplation, were to be considered as concerned. The plaintiff insists, that he was so interested in the whole concern at the time when the policy was effected, and especially at the time when the loss happened, as to be entitled to recover the whole for his own use.

The report finds, that the plaintiff and Lamson bought the vessel together, and that the policy was made payable to the plaintiff, because Lamson had paid nothing for the vessel, and the plaintiff had indorsed Lamson's notes given for his moiety. And this statement was made to the president and secretary of the insurance company. And the plaintiff paid the whole of the premium. The plaintiff therefore had an interest when the policy was made, that the loss, if any should happen, should be paid to him, to enable him to get an indemnity against the liability he had assumed as indorser for Lamson for his half of the vessel. But there was no writing at that time between the plaintiff and Lamson in the nature of a mortgage, or otherwise. But after a few months, and before the loss, viz., in October following the July when the policy was made, Lamson, like an honest man, gave a bill of sale to the plaintiff of his moiety, and he afterwards deceased. The plaintiff then became directly interested in the whole vessel, and continued to be and was interested in the whole at the time of the loss. The case does not resemble *Carroll v. Boston Mar. Ins. Co.*, which was relied upon by the defendants, upon this point; for there the assignment was to a stranger to the party named in the policy, here not.

If no assignment had been made by Lamson, there could be no doubt but that the plaintiff might have recovered the whole, and would be accountable to Lamson for the half; and he would, without doubt, have been thereby released from his liability as indorser. The intent of Lamson was to give the plaintiff an actual title, and not a mere contingent equitable interest. And can it be maintained, that the assignment shall be considered as operating so as to destroy the right which he before had to receive the whole money in case of loss? We think not.

In *Rhind v. Wilkinson*, 2 Taunt. 242, it was considered that an averment of interest at the time of affecting the policy, is im-

material. The court held, that if the declaration had averred, that the plaintiff was interested at the time of the ship's sailing, or that the policy was made on a certain day, and that afterwards, on a subsequent day, the plaintiff acquired an interest, it would be sufficient. The material allegation is, that the party assured had a legal interest at the time of the loss. We are satisfied that the plaintiff had such interest, in the case at bar, and that none of the objections which have been raised, can prevail against the plaintiff's legal claim to recover.

The plaintiff, in the agreement to refer, has waived his abandonment, and claim for a total loss, and the case must be submitted to an assessor to assess the damages as upon a partial loss.

INSURANCE ON A VESSEL at and from A. to B., with liberty to stop at C., will cover the vessel during the entire voyage, where she leaves A. for C. in a condition of seaworthiness adequate to the risk of the voyage, though it would not be a condition of seaworthiness for a voyage to B., if while at C., before leaving for B., the vessel is made seaworthy for that voyage: *Cobb v. New England etc. Ins. Co.*, 6 Gray, 203, citing the principal case. The insurance upon a vessel "at and from" a foreign port covers the vessel as soon as she has been moored safely twenty-four hours after her arrival at port: *Garrigues v. Cox*, 2 Am. Dec. 493.

OBJECTION TO NATURE AND KIND OF PROOF IS WAIVED, if the insurer places his refusal to pay upon other grounds: *Thwing v. Great Western Ins. Co.*, 111 Mass. 110, or if the insurer contents himself with a general refusal to pay, and subsequently enters into negotiations for a settlement of the loss: *Graves v. Washington Mar. Ins. Co.*, 12 Allen, 394, citing the principal case, which is also cited in *Ryder v. Phoenix Ins. Co.*, 101 Mass. 550.

SUIT MAY BE BROUGHT BY A CONSIGNOR IN HIS OWN NAME, upon a policy taken out by his consignee for benefit of whom it may concern: *Baldwell v. Merchants' Ins. Co.*, 29 Am. Dec. 444.

SEXTON v. NEVERS.

[20 PICKERING, 451.]

OFFICER NEGLECTING TO PROPERLY LEVY UPON, advertise, or sell property upon execution, whereby the purchaser loses title, is liable to such purchaser in an action on the case.

OFFICER IS RESPONSIBLE FOR NEGLECT OF DEPUTY in not giving legal notice of sale.

MEASURE OF DAMAGES IN AN ACTION AGAINST AN OFFICER for failing to give proper notice of a sale, if it be shown that the plaintiff has not lost any title by the error, is no more than the fees which the officer has collected for the levy and sale.

ACTION against sheriff for default of his deputy. The facts appear from the opinion.

Baker, for the plaintiff.

Wells and Alword, for the defendant.

By Court, MORTON, J. In levying an execution on an equity of redemption, the officer is bound to comply with all the regulations established by law, in relation to the notification, the mode of conducting the sale, the title to be given to the purchaser, and the return of his precept. These are official duties, for the neglect of which the delinquent is not only liable for himself, but the principal for his deputy. For a breach of these or other duties in the service of an execution, the officer is answerable to others injuriously affected by his conduct, as well as to the parties to the original judgment. Thus an action will lie in favor of other attaching creditors: *Rich et al. v. Bell*, 16 Mass. 294; *Whitaker v. Sumner*, 7 Pick. 551 [19 Am. Dec. 298], and 9 Id. 308. So it will lie in favor of the purchaser. It is true that he may require the warranty of the officer, that the requirements of the law have been complied with; but he is not bound to rely upon such warranty. It might in many cases prove an inadequate remedy.

It appears from the officer's return, that he posted notifications in two towns adjoining the place of sale, instead of two towns adjoining that in which the land lay. This was such an error as rendered the sale invalid. Nothing passed to the plaintiff by the sheriff's deed, and he may well maintain this action for any injury which he thereby sustained. The officer's blunder injured no one but the plaintiff. It was a direct wrong to him, and he is entitled to a remuneration. The only question of any difficulty, is the extent of the plaintiff's suffering. *Prima facie*, the price paid would seem to be the proper measure of damages. The purchaser loses his land and the sum paid would not necessarily be exactly equivalent to the injury sustained. In some cases it might be too much, in others too little. In the case at bar the rule has no application.

The executions upon which the equity was sold, were the property of Pitkin and Sexton. Sexton bid just enough to cover the amount of the executions and the costs of the service. No money was paid except for the fees. In cases where the equity is bought by the creditor, the sum bid is no certain criterion of the value of the property. Whether Sexton at this auction acted as the agent of the company, or not, does not distinctly appear. But the facts clearly show that he acted in pursuance of an agreement with Wood; and that the whole object of the sale on the execution,

and the purchase by the plaintiff, was to perfect Wood's title. Pitkin and Sexton having purchased the equity, which was at the time subject to several attachments, and having also procured assignments of the judgments which held these liens, conveyed the estate to Wood. All these parties fearing that there might be other attachments subsequent to the above and prior to the conveyance between them, agreed to sell the equity on the first executions, to guard against any such apprehended attachments. Sexton was to bid it off and then convey to Wood, who had purchased of Pitkin and Sexton and given them his note for the amount of their demand upon the property, including the three executions which they had purchased. The whole proceeding was intended solely for the benefit of Wood. A special confidence was placed in Sexton by Wood. There seems, too, to be sufficient evidence of this trust.

If Sexton had obtained a perfect title to the equity, he would have been bound by his agreement to transfer it to Wood. He could in no way have derived any benefit from it without a breach of trust. Subsequent events show that no such attachments as were apprehended, existed. Wood's title remained valid, and this precautionary measure proved to be unnecessary and entirely useless. No conveyance was made by Sexton subsequently to his purchase, and none could add anything to the strength of Wood's title. No one, so far as the title to the estate was concerned, lost or gained anything by the officer's mistake. The plaintiff therefore can not recover any damage on this ground.

It is true that some time after the sale on execution, Pitkin and Sexton became doubtful of Wood's ability to pay the note which he had given; and that Pitkin, in the absence of his partner, undertook to sell the equity, and did in fact convey the same to one Maynard for a certain sum, which he indorsed upon Wood's note. Since that time, upon the discovery that the sheriff's sale was defective and that Sexton acquired no title by it, the purchase money has been repaid. And the plaintiff now seeks to recover the amount in this action.

But this claim can not be supported. The indorsement was made upon a partnership note, and this loss, if any has accrued, is the loss of the company and not of the plaintiff. But it is very clear that the partners could not recover for it. The conveyance of Pitkin could pass nothing. He had no title. But if Sexton had transferred his title to him it would make no difference. Wood needed no additional assurance of title; and a conveyance to any one else would be in violation of the agree-

ment between him and Sexton; a breach of trust; and entirely subversive of the object which all parties had in view, in making the sale on the executions. Pitkin and Sexton made the indorsement in their own wrong. If, by reason of their having recovered judgment on the note, the mistake can not now be corrected, the loss must fall on those who committed the error. The plaintiff paid the fees and other expenses of the levy of the execution to the defendant's deputy. These he has no right to retain. He was bound to execute the precept according to law. For this service he was entitled to the legal fees. For this the plaintiff paid him. In the apprehension that there might be an attachment on the property, the parties interested were willing to incur the expense of a levy, to guard against such a lien. But the officer, by his neglect of duty, deprived them of the benefit of the security which they sought. And to allow him to retain compensation for services he never effectively performed, would be gross injustice.

Although in some things in relation to the service of the execution, it is apparent that the plaintiff acted for the company, yet it does not appear that the money was paid for the company, or for Wood. Neither had any such connection with the transaction as will sustain an action. If the sheriff or his deputy be liable to any one, it must be to the plaintiff. He apparently bid for himself; he took the conveyance in his own name; he was personally liable to pay, and did in fact pay, the fees and expenses. And for these, with interest from the time of payment, he is now entitled to judgment.

INHABITANTS OF DEERFIELD v. ARMS.

[20 PICKERING, 480.]

ARBITRATION—SUBMISSION ATTEMPTED TO BE MADE under the provisions of the statute, and providing that judgment thereon be entered in the court of common pleas, if inoperative as a statutory, is not valid as a common law submission to arbitration.

DEBT upon an award. The facts appear from the opinion.

Wells, Alvord, and Davis, for the plaintiffs.

Billings and Newcomb, for the defendant.

By Court, DEWEY, J. It appears from the facts stated, that the parties to the present suit agreed to submit certain matters in controversy to an arbitrator, under the provisions of the re-

vised statutes, c. 114. The submission was in its form entirely corresponding with the provisions of the statute, and contained the usual stipulation that the report of the arbitrator should be made to the court of common pleas, and that judgment thereon should be final. But inasmuch as the submission to the arbitrator was acknowledged before the person named as arbitrator, acting in his capacity of justice of the peace, it was ineffectual as a proceeding under the statute, it not being competent for the person proposed as arbitrator, to give himself jurisdiction of the case, by an act of his own in another capacity, as was held in *Drew v. Canady*, 1 Mass. 158. Under this submission the arbitrator made an award in favor of the plaintiffs, which being returned to the court of common pleas, that court refused to enter a judgment upon the award accepting the same, but dismissed the action on the ground that they had no jurisdiction of the case.

The plaintiffs now seek to enforce their claim as on an award upon a submission at common law, and declare upon the submission as if the same had been made to the arbitrator named in it, without any reference to the statute, or the stipulation that the award shall be returned to the court of common pleas for acceptance and final judgment thereon. It is very obvious that this is changing the form and character of the submission from the original purpose and design of the parties, but the plaintiffs claim the right thus to enforce the award, because the submission, being inoperative under the statute, can in this way only be rendered effectual. This position is attempted to be maintained by decisions of this court in cases supposed to be analogous. It is urged that the rule of law which has been often applied in the construction of conveyances of real estate, that if they can not operate in the precise manner indicated in the form adopted by the parties, by reason of some technical rule, yet effect should be given to them in some other way, furnishes a strong analogy favorable to the views of the plaintiffs in the present case. But we think that this doctrine is not to be so applied as to change the contract in a manner that will operate more prejudicially to a grantor than was intended by him. The rule is only adopted for the purpose of carrying into effect the intent of the parties. In the earliest reported case in which this principle was applied in this court, *Marshall v. Fisk*, 6 Mass. 24 [4 Am. Dec. 76], it was stated thus: "A conveyance of land by deed may here be considered as any species of conveyance necessary to carry into effect the intent of the parties to the deed, and not

repugnant to the terms of it." It is only under this limitation that the rule has been applied, and in all such cases it has been a cardinal principle, that the effect given to the contract is not in violation of the object and purpose of the party executing it.

The decision of this court in the case of *Thomas v. White*, 12 Mass. 367, sustaining a suit upon a bond given to the judge of probate as a good bond at common law, where the bond was extra-official and not in pursuance of the statute, although intended by the obligor as a probate bond, is also supposed to furnish a precedent for the application of the doctrine urged by the plaintiff. That case may seem on the first impression to present a question somewhat analogous, as the rights of the parties may be said to be affected by changing the character of the bond to the judge of probate from that of a statute bond to one at common law, inasmuch as by the provisions of our statute all suits on probate bonds are to be originally instituted in the supreme judicial court, while a suit on a bond to the judge of probate which is only good at common law, must be commenced in the court of common pleas. But the provision that a suit on a probate bond shall be instituted in the supreme judicial court, is merely a statute regulation as to the remedy. It forms no part of the contract, that any action that may be commenced on such a bond shall be originally instituted in one court rather than another. The legal forum, as respects any remedy sought to enforce it, may be changed at the will of the legislature, without impairing the contract or violating any rights of the obligor of such a bond.

Another class of cases alluded to by the counsel for the plaintiffs, is that of jail bonds not conformable in all respects to the statute on that subject, and which yet have been held good. Also in the case of replevin bonds, it is said that these have been sometimes considered as good at common law, where they were not made in accordance with the statute. But in all these cases, as well of jail bonds as replevin bonds, I apprehend it will be found, that the circumstance that the form of the bond varied from the statute, and thus changed its character from a statute bond to one at common law, did not so vary its effect as in any manner to interfere with the rights of the obligor, by imposing upon him any greater liabilities, or depriving him of any stipulations in his favor.

Do these decisions, or the principles sanctioned by them, furnish any sufficient authority for sustaining the present action? If the law be as is claimed by the plaintiffs, it is diffi-

cult to perceive any good reason why in all cases of awards upon submissions under the statute, which have been found defective in form, they might not have been enforced as awards at common law. Cases of awards that have been rejected by the court on account of some informality in the submission in not pursuing the requisitions of the statute, are of frequent occurrence, but I am not aware of any attempt to enforce them afterwards by suit, as awards upon a submission at common law.

To hold that the defendant is liable upon the submission as upon an agreement for arbitration at common law, and that he thereby stipulated to submit the matters in controversy between himself and the plaintiffs to the sole determination of Mr. Saxton without subjecting his proceedings to the supervision of the court of common pleas, would be to substitute another and a very different contract from that into which he entered. It would be inconsistent with the language of the submission, and would deprive the defendant of a right reserved to himself in the most explicit manner. No principle is better settled, than that the agreement of the parties to the submission is to be strictly observed respecting the persons authorized to decide. The submission being defective as a submission under the statute for want of an acknowledgment before a justice of the peace, competent to act in the case, is wholly inoperative. It being so, the plaintiffs can not maintain an action at common law upon any award made upon it, and it becomes unnecessary to consider the other objections taken to the award.

Plaintiffs nonsuit.

A REFEREE CAN NOT TAKE AN ACKNOWLEDGMENT of one of the parties under the statute relating to awards: *Heath v. Tenney*, 3 Gray, 381, citing the principal case.

WHEELER v. GUILD ET AL.

[20 PICKERING, 545.]

NOTE TRANSFERABLE BY DELIVERY, IF NOT OVERDUE OR APPARENTLY DISHONORED, may, in the ordinary course of business, in good faith, and for valuable consideration, be transferred so as to vest valid title in the transferee, although stolen from the true owner, or deposited with the transferee for some special purpose, and without authority to transfer it. PAYMENT OF A NOTE AT MATURITY TO THE APPARENT HOLDER IS VALID, he having the legal title, and the payor having no notice of any defects in such title; but the person to whom payment is so made must have actual possession of the note, ready to be delivered, and must surrender it, otherwise the payment will not be valid unless to the true owner.

ACTION on a promissory note, dated September 1, 1833, made by defendants to D. G. Wheeler, or order, payable in three years, with interest, and indorsed in blank. The facts appear in the opinion.

Washburn, for the plaintiff.

Allen and Barton, for the defendants.

By Court, SHAW, C. J. The facts of this case present a very important question for the consideration of the court. Whatever affects the negotiability, and the free currency of promissory notes and bills of exchange, is of the utmost importance to a mercantile community, the business of which is to a great extent transacted through the medium of these instruments.

The facts which may be deemed material are these: The plaintiff became the holder of the note in question by regular indorsement for valuable consideration, soon after it was made, being a note dated September 1, 1833, payable in three years, with interest, and the last indorsement being in blank. Within a year from the date of the note, to wit, in March, 1834, the plaintiff, John Wheeler, as surety, joined with Daniel G. Wheeler in three promissory notes, one to Brigham & Goodrich, attorneys and partners, in Worcester, one to Tappan & Co., and one to Stewart & Co. of New York, for both of which parties Brigham & Goodrich were agents and attorneys. On that occasion, the plaintiff, John Wheeler, delivered to Brigham & Goodrich, as collateral security to his three joint and several promises, the note in question, indorsed in blank, and took their receipt, specifying that it was so received, and to be by them held as collateral security for the payment of those notes. In September, 1835, these three notes had been fully paid. Though Brigham and Goodrich were in partnership as attorneys at law, yet Brigham was engaged in much other business, and had many separate negotiations, and the business in question had been done in the partnership name, but in fact by Goodrich. In December, 1835, the plaintiff applied to Goodrich for the note, who then produced and exhibited it from a file of private papers, where it had been kept by him, and he would then have given it up to the plaintiff, but the plaintiff had not his receipt with him, to exchange for it. In the mean time, before this application of the plaintiff to Goodrich, viz., on the twenty-eighth of November, 1835, Brigham had received of Stafford, one of the firm of A. H. Guild & Co., and one of the defendants, five hundred dollars to pay the note in question, describing it as a note payable in Septem-

ber, 1836, and gave him a receipt, in his separate name, signed D. T. Brigham, stating that the five hundred dollars had been received in full payment of the note, and the note to be delivered up to Stafford. Soon after the application of the plaintiff to Goodrich above stated, viz., about the twenty-fourth of December, Stafford, one of the defendants, producing Brigham's receipt, applied to Goodrich for the note, who declined giving it, on the ground that Brigham had no right to receive pay for, and discharge the note, and by mutual consent, it was placed in the custody of a gentleman, for the use of the party having the better title to it, by whom it was produced in this court on the trial.

Some inferences are to be drawn from this evidence, which may have a bearing on the case; but we think they are plainly deducible from the circumstances stated, and they are these: that Goodrich did not assent to the payment received by Brigham, and did not in fact know of it till after he had been applied to by the plaintiff for the note; that Goodrich had the actual possession and custody of the note, and that at the time that Brigham received the money and gave the receipt, he not only did not produce or exhibit the note, but that he had not the actual custody of it, nor was it so amongst the partnership papers, as that it was in the actual joint custody of the parties as partners. If he had it in his possession, or had regular access to it, in the ordinary way of business, there is no reason why he did not deliver it up to Stafford, instead of giving him a receipt, and a promise to deliver it.

The law in regard to bills of exchange and promissory notes, is so framed as to give confidence and security to those who receive them, for valuable consideration, in the ordinary course of business, when payable to bearer or indorsed in blank so as to be transferable by delivery; and in general a party taking such a bill under such circumstances, has only to look to the credit of the parties to it, and the regularity and genuineness of the signatures and indorsements. So that if such a bill or note be made without consideration, or be lost or stolen, and afterwards be negotiated to one having no knowledge of these facts for a valuable consideration, and in the usual course of business, his title is good, and he shall be entitled to receive the amount: *Miller v. Race*, 1 Burr. 452; *Peacock v. Rhodes*, 2 Doug. 633; *Grant v. Vaughan*, 3 Burr. 1516. The credit which the law thus attributes to notes and bills of exchange which are transferable by delivery, arises mainly from the confidence inspired by the actual custody and possession, and the actual delivery of the

security upon such negotiation. To so great an extent is this principle carried, that in regard to bank notes, and in most respects in regard to all other bills and notes transferable by delivery, the title and the possession are considered to be inseparable. And it will be presumed that the party thus in possession of a bill, holds it for value, until the contrary appears; and the burden of proof is on the party impeaching his title: *Collins v. Martin*, 1 Bos. & Pul. 648.

But these rules are adopted with this limitation, that the party thus taking the note or bill, does it in the ordinary course of trade, when not overdue or otherwise dishonored by anything apparent upon the face of it, and without notice that it had been lost or stolen, or that the holder had obtained it wrongfully, or had no just right to receive it in the way of business: *Paterson v. Hardacre*, 4 Taunt. 114. If one takes a note or bill with actual notice, that it has been lost by the owner, he can not hold it against the true owner: *Lovell v. Martin*, Id. 799.

It has been argued, that where a party has a legal title by indorsement and delivery, and the actual possession of the bill or note, although he holds without any just right to negotiate or collect it, still as he has a legal title, a transfer from him will vest a legal title in another and authorize such other to take for his own use. But this consequence, we think, does not follow. The true ground is expressed by Eyre, C. J., in the case above cited, *Collins v. Martin*. He says: "For the purpose of rendering bills of exchange negotiable, the right of property passes with the bills themselves. The property and the possession are inseparable. This was necessary to make them negotiable, and in this respect they differ essentially from goods." In another part of his judgment, in assigning the reason why a person thus having a legal title, may not enforce the collection of the bill, whether he has given value for it or not, he says: "If it can be proved that the holder gave no value for the bill, then he is in privity with the first holder, and will be affected by everything that affects the first. This all proceeds upon an *argumentum ad hominem*. It is saying, you have the title, but you shall not be heard in a court of justice to enforce it against good faith and conscience." The same reasoning applies to other cases, where a party has the custody of a bill, without any just right or lawful authority to collect or negotiate it, as where it has been lost or stolen, or embezzled from the true owner, or intrusted to an agent, for a special purpose only; if these facts are known to the party receiving it, he is in privity with the party from whom

he receives it, and can not be heard in a court of justice, though having a legal title to enforce an inequitable and unjust demand. Such a case is not within the reason of the rule, which is designed only to protect bills and notes, when taken in good faith, in the course of business. If a note is paid, not in the usual course of business, or to a person having the custody, but not authorized to receive payment, and that known to the party paying, though the note be given up, it is no discharge against the true owner: *Kingman v. Peirce*, 17 Mass. 247.

So, payment of a bill or check, before it is due, will not be a discharge, unless made to the real proprietor of it; and therefore where a banker, contrary to usage, paid a check the day before it bore date, which had been lost by the payee, it was held, that he was liable to repay the amount to the person losing it: *Da Silva v. Fuller*, Sel. Cas. 238, cited in Chitty on Bills, 6th Eng. ed., 148. In this case, although the holder had the legal title arising from the possession of the check, yet he was not *bona fide* the holder with authority to collect, and as the banker paid it out of the usual course of business, he paid it at the risk of being obliged to pay it again, if the party presenting it had not just right to receive it.

Most of the same principles and reasons apply alike to transfers and to payments. We think the rules deducible from the cases, are these: Where a party takes a bill transferable by delivery, not overdue nor otherwise apparently dishonored, for valuable consideration, in the usual course of business, and without notice, actual or constructive, that the holder came by it unlawfully or without title, and has no just right to collect and receive it, the party taking it shall hold it as a valid security, notwithstanding that it has been lost by the true owner, or stolen from him, or taken by the holder as a mere agent to keep, or for other special purpose, without any authority to collect or transfer it, otherwise he shall not be deemed to have a good title to hold and enforce payment of it, or to withhold the bill itself or the proceeds of it, from the party justly entitled: *Bleaden v. Charles*, 7 Bing. 246. The same rule applies to payments; if a bill be paid at maturity, in full, by the acceptor, or other party liable, to a person having a legal title in himself by indorsement, and having the custody and possession of the bill ready to surrender, and the party paying has no notice of any defect of title or authority to receive, the payment will be good. But in both cases faith is given to the holder, mainly on the ground of his possession of the bill, ready to be surrendered or delivered, and the

actual surrender and delivery of it upon the payment or transfer. If therefore, upon such payment, the holder has not the actual possession of the bill ready to be delivered, and does not in fact surrender it, but gives a receipt or other evidence of the payment; and if it turns out that the party thus receiving, had not a good right and lawful authority to receive and collect the money, but that another person had such right, the payment will not discharge the party paying, but will be a payment in his own wrong; he must pay the bill again to the right owner, and must seek his redress against the party receiving his money, on the pretense that he had a right to receive it as the holder of the bill, when in fact he had no such right.

Applying these principles to the present case, the court are of opinion, that the payment made by Stafford to Brigham, under the circumstances, did not operate as a payment and discharge of this note, and that the plaintiff is entitled to recover.

The plaintiff was the holder of this note by indorsement, before it was pledged to Brigham & Goodrich, and had the complete legal and equitable title to it, and the whole beneficial interest in it. Being transferable by delivery, when transferred to Brigham & Goodrich, they took the legal title, with a right to collect it, and apply the proceeds to the payment of the notes, for the security of which it was pledged, if they should not be otherwise paid. But when those notes were paid, all right of Brigham & Goodrich to transfer or collect it ceased, and they had the mere naked possession of it for the plaintiff, to be surrendered on demand. Now whatever might have been the effect of an actual surrender and delivery of this note to one of the promisors, on receiving payment, it is very clear, that according to all the rules applicable to this subject, without surrendering and delivering up the note, the payment must be considered as made at the risk of the party paying; and as the party receiving, in fact had no right to receive payment, such payment and receipt did not discharge the note, as against the true owner. It is not necessary to consider whether Brigham was acting in his partnership capacity or not; because after the purpose was accomplished, for which the note was pledged to the partners, they had no just right or lawful authority to transfer or collect the note, as against the plaintiff. If they had jointly transferred it in the due course of business, although their transfer without notice might have held it, it would be in virtue of the law which protects such transfers to a party without notice, in order to give effect to the currency of bills and notes, and not because

Brigham & Goodrich had any right or lawful authority. If therefore they had given a transfer in writing with a promise to deliver the note, not delivering or producing it, no title would have passed as against the plaintiff, because such transfer without delivery, would not be within the reason or principle of the rule.

But we think the other point is equally decisive. Brigham not only did not produce or exhibit the note, but he had not the actual custody or possession of it. He did not profess to act for the partnership, but signed the receipt in his own name. Had Brigham & Goodrich, as partners, been the true holders of the note, or if they had had a joint authority to collect it, it may well be admitted, that the act of one or the receipt of one would bind both. But all the right and authority which they ever had over the note, except to give it back to the plaintiff, agreeably to their contract, had ceased. A receipt of one therefore in his own name, and not purporting to be for the use of both, was not within the scope of the partnership authority, and did not bind his partner. The defendant Stafford gave credit to Brigham only. For though his receipt purports to be, not merely executory, but a present discharge of the note, yet as he had no authority to discharge it, either by himself, or for himself and partner, and as he had not the note to surrender and give up, the legal effect and operation of his receipt, was, an executory undertaking, that he would procure a discharge of the note and surrender it. The consequence is, that Stafford paid his money to the wrong person, and must look to him for an indemnity. Besides, the note was not paid in the due course of business. It was paid many months before it was due; the full sum was not paid, there being more than two years' interest due on the notes, which was wholly relinquished; no notice was given to Goodrich, the partner who transacted the business of taking these notes, and giving the receipt for them, and who had the actual custody of this note; all of which would be strong evidence to go to a jury, to establish the fact of constructive notice to Stafford, that Brigham had no right, either in his own name or as a partner with Goodrich, to receive payment of, or to discharge this note. But the other grounds are sufficient, without relying upon these circumstances.

The grounds upon which the court place their judgment are these: The plaintiff had once a good title to the note. It was delivered to Brigham & Goodrich, for a special purpose, which was accomplished. After that, Brigham & Goodrich had a

mere naked custody of the note for the plaintiff and had no right or lawful authority either to negotiate or collect it; *a fortiori*, Brigham alone had no such authority. The defendant Stafford was not lawfully called upon to pay Brigham, as having the possession and custody with a *prima facie* title, because he had no such custody or possession, and the note was not due. Stafford was not deceived into taking the note by the production and delivery of it, because it was not delivered or produced; if he paid it therefore to Brigham, without having up his note, he did it on the faith that Brigham had good right to receive payment and discharge it, and of course under the liability to pay it over again to the rightful proprietor if Brigham had not such right. In fact and law, Brigham had no such right, but the plaintiff was at the time the rightful proprietor, and of course the defendants obtained no discharge by such payment, but upon the maturity of the note they were bound to pay it to the plaintiff. The note having been put by Mr. Goodrich into the hands of a common friend, for the use of the party entitled, and the plaintiff having shown himself entitled, the note was rightly brought in by the person to whom it was thus intrusted, as evidence for the plaintiff.

Judgment for plaintiff.

INDORSEMENT OF A NEGOTIABLE NOTE before maturity transfers to the indorsee who takes in good faith, in the ordinary course of business, and who pays value, a perfect title, whether his indorser acquired possession of the note by fraud, whether he found it, or, in a word, whatever defenses might have existed against him: *Chicopee Bank v. Chapin*, 8 Metc. 43; *Blanchard v. Stevens*, 3 Cush. 167; *Hilton v. Smith*, 5 Gray, 401; *Merriam v. Granite Bank*, 8 Id. 258; *Atlantic Bank v. Merchants' Bank*, 10 Id. 550; *National Bank of North America v. Kirby*, 108 Mass. 500. In like manner a person making a note payable to bearer is responsible to the party who presents it: *Petlee v. Prout*, 5 Gray, 503, all citing the principal case.

The rights of the transferees of negotiable paper, which has been either stolen or lost, is treated of in *Vairia v. Hobson*, 23 Am. Dec. 125 and note.

ALLEN v. SCOTT ET AL.

[21 PICKERING, 25.]

GRANT OF PROPERTY INCLUDES all that is necessary to its enjoyment. An exception out of a grant includes all that is necessary to the enjoyment of the thing excepted.

GRANT OF LAND AND ALL THE BUILDINGS thereon, "except the brick factory," does not pass the land on which the factory stands nor the water privilege appurtenant thereto.

BILL in equity, filed by Allen against Scott and others. The facts are stated in the opinion.

Barton and Allen, for the plaintiff.

Washburn, for the defendants.

By Court, WILDE, J. The plaintiff alleges in his bill, that he was seised and possessed, on the twenty-fifth of January, 1836, of an undivided fourth part of a certain brick factory, in common with the defendants, and continued so seised and possessed up to the time of filing the bill, and claims his proportional part of the rents and profits received by the defendants during that time. The defendants deny the plaintiff's title to any part of the factory; and the case depends on the question of title. Other questions have been raised and argued, but they become immaterial, as the plaintiff, in the opinion of the court, has failed to show any title to the premises claimed.

Both parties claim title under one Joseph Ray. The plaintiff, having recovered judgment against Ray, levied his execution on one fourth part of the factory as his personal property; and Benjamin Ray, one of the defendants, having also recovered judgment against Joseph Ray, levied his execution on the same fourth part of the factory, and on the land on which the factory stood, as the real estate of Joseph Ray. It appears in evidence, that before either of these executions was levied, Joseph Ray had mortgaged his share of the lot of land on which the factory stood, excepting however the factory; and the argument for the plaintiff is, that this exception extends only to the factory building, and not to the land under it, nor to the water-power as appurtenant thereto; and consequently, that as Joseph Ray had no title to the land nor any interest in it, the factory building must be considered as personal estate. This argument, however, can not, as we think, be maintained. This exception in Ray's mortgage, like a grant, must be construed according to the meaning of the parties, if not inconsistent with the rules of law.

From the nature of the property there seems to be no question as to the meaning of the parties. They undoubtedly intended that the mortgagor should continue to have the same title in the factory, and to occupy and enjoy it in the same manner as he had done, and had a right to do, previous to the mortgage. He can not be supposed to have reserved his portion of the building for the purpose of removing it; for this, if it could be done, would be nearly a total destruction of the property. And be-

sides, the factory could not be divided so as to allow Ray to hold his part in severalty; and he had no right to remove the building without the consent of the other tenants in common. It follows therefore, that he could hold and enjoy nothing of any value under the exception, unless he had the right to occupy the factory with the other tenants in common, as it stood at the time of the mortgage; and we think it very clear that he had this right under the exception in the mortgage deed. Such a right of occupation is an interest in the land amounting to an estate in fee, defeasible perhaps by the destruction of the factory; but of this it is not necessary to give an opinion. Nor is it necessary to decide that Joseph Ray had an estate in fee in the land; for if he had any right and interest in the land, the factory was not severed from the realty, and was not personal estate. That he had, with the other tenants in common, the exclusive right to the occupation of the land on which the factory stood, and to the enjoyment of the water privilege, can not, we think, admit of a reasonable doubt. When property is granted, all that is necessary to the enjoyment of the grant is impliedly granted as incident to the express grant; and the same rule of construction applies to an exception in a grant.

By the grant of a house a conduit which conveys water to the house passes: Bac. Abr., Grant, I, 4. So, by a grant of a messuage or house, the garden and curtilage pass: Co. Lit., 5 b; *Carden v. Tuck*, Cro. Eliz., 89. And if a man grant *omnes boscos suos*, the land, as well as the wood, passes. So, if he grant a boillery of salt, the land passes: Co. Lit., 4 b. In the case of *Archer v. Bennett*, 1 Lev. 131, it was found by special verdict, that A. being seised of a mill and of a kiln at the end of the close wherein the mill stood, granted the mill; and the question was, whether the kiln passed; and it was held, that it would have passed if it had been found that the kiln had been necessary to the mill. So, a grant of a mill passes the right to the water also: Bac. Abr., Grant, I, 4; *Welmor v. White*, 2 Cai. Cas. 87 [2 Am. Dec. 323]. A similar rule of construction applies to exceptions in a grant. Thus, if a man lets his manor except the woods, underwoods, etc., the soil is excepted: 2 Roll. Abr. 455; *Ive v. Sams*, 2 Cro. Eliz. 521.

Upon these authorities and rules of construction we think it very clear, that Joseph Ray's title to the factory and the land on which it stood, and the water privilege, did not pass by his mortgage deed; and that by Benjamin Ray's levy the title passed to him, and is a valid title, subject only to a prior outstanding

mortgage which does not affect the question of title between the present parties.

Bill dismissed.

Cited in *Sweetser v. French*, 2 Cush. 309, and *Esty v. Carrier*, 98 Mass. 501, upon the point that the grant or reservation of a house, mill, or other building, annexed to land, and to be used while thus annexed, includes the land under it.

BLACKSTONE BANK v. DAVIS.

[21 PICKERING, 42.]

CONDITION ANNEXED TO A DEVISE OF LAND, that it shall not be "subject to conveyance or attachment," is void.

TRESPASS *quare clausum fregit*. The facts are stated in the opinion.

C. Allen, for the plaintiffs.

Barton, *contra*.

By Court, WILDE, J. This is an action of trespass *quare clausum fregit*; and the only question submitted by the facts agreed is the question of title, the breaking and entering of the close by the defendant being admitted. It is not questioned that the devise respecting the Bartlett farm is a good devise to pass the farm to the devisee. By the devise of the profits, use, or occupation of land, the land itself is devised. Whether the defendant took an estate in fee, or for life only, is a question not material in the present case. The sole question is, whether the estate in his hands was liable to attachment and to be taken in execution as his property. The plaintiffs claim title under the levy of an execution against the defendant, and their title is valid if the estate was liable to be so taken. That it was so liable, notwithstanding the proviso or condition in the will, the court can not entertain a doubt.

A condition in a grant or devise, that the grantee or devisee shall not alienate, is void because repugnant to the estate: Co. Lit. 223a. And so it is as to a condition annexed to a gift or sale of a term for years, or any other chattel, real or personal. A condition or proviso to restrain or prohibit the operation of an attachment and levy of an execution is void for the same reason, and because it is contrary to law, which makes a man's property liable for the payment of his debts. A condition that the grantee or devisee shall not alienate for a particular time or to a particular person or persons, is good. So, in a devise to a minor, pro-

vided he shall not come into possession, occupy, or have any advantage of the estate during his minority except through his guardian, who is to lease, occupy, and improve the estate, the proviso is good and valid in law: *Smithwick v. Jordan*, 15 Mass. 113.

The clause in the devise under consideration is without any limitation, and declares that the property devised shall not be subject to conveyance or attachment perpetually. Such a declaration or provision the testator had no authority to make. It was an attempt to impose a restraint upon property which the law will not allow, and the provision is clearly void.

Defendant defaulted.

Cited in *Gleason v. Fayweather*, 4 Gray, 351, to the effect that a chief ingredient in the legal right of property is a right to dispose of it, a right to exchange, sell, or give it away.

WHETHER PROPERTY MAY BE SO DEVISED AS NOT TO BE SUBJECT TO EXECUTION AGAINST BENEFICIARY.—The general rule seems to be that upon the death of a person seised of lands, his estate passes, by operation of law, to his heirs or devisees, who have a legal estate therein, which may be alienated or devised by them, and which is also subject to execution for their debts, as other beneficial legal estates are: *Freeman on Executions*, sec. 184. Whether a testator may so devise his property as to exempt it from forced sale for the devisee's debts, is a question which presents considerable difficulty. Conditions subsequent are not favored in law, and are always strictly construed, because they tend to destroy estates. Neither are they sustained when they are repugnant to the nature of the estate granted, or infringe upon the essential enjoyment of property and tend manifestly to public inconvenience: 4 Kent Com. 131. A condition annexed to a conveyance in fee, or by devise that the purchaser or devisee should not alien, has ever been held to be repugnant to the estate granted, and consequently invalid. It would seem to follow from this general rule, the accuracy of which has never been questioned, and to sustain which the citation of authorities is unnecessary, that the policy of the law would not permit one person to transfer property to another, by devise or otherwise, absolutely for his own use and subject to his control, and then to say that it shall not be liable in execution for his debts. Such seems to be the law in cases of a devise of property, either directly to a person or through the intervention of trustees, with simply a naked and absolute condition of this kind annexed: 2 Redf. on Wills, 300; 3 Id. 494; *Lew. on Trusts*, 135, and cases cited; *Snowden v. Dales*, 6 Sim. 524; 2 Jar. on Wills (Am. notes by Randolph and Talcott), 538; *Deering v. Tucker*, 55 Me. 284; *Hallet v. Thompson*, 5 Paige, 583; *Jones' will*, 23 L. T. R. (N. S.) 211; *Pace v. Pace*, 73 N. C. 119.

In *Jones' will*, *supra*, a condition annexed to an absolute gift to A., that it should go to his sisters, "if his share shall become liable to be seized by his creditors, or if he shall become bankrupt, or shall alien or mortgage the same," was held repugnant to the gift and void. So in *Pace v. Pace*, 73 N. C., 119, a devise of certain property was made upon the condition that it should not be subject to the disposal or debts of the devisee. The condition was held void. Such is also recognized to be the law by the supreme court of the United States. "It is a settled rule of law that the beneficial inter-

est of a *cestui que trust*, whatever it may be, is liable for the payment of his debts. It can not be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and immunity from his creditors. A condition precedent, that the provision shall not vest until his debts are paid, and a condition subsequent, that it shall be divested and forfeited by his insolvency with a limitation over to another person, are valid, and the law will give them full effect. Beyond this, protection from the claims of creditors is not allowed to go:" *Nichols v. Levy*, 5 Wall. 441, *per* Swayne, J. The rule as thus laid down does not prevent a person from so transferring his property as to give the benefit of it to a particular person, and at the same time secure the *corpus* against the donee's creditors, as well as his own acts. This may be accomplished by transferring property, either real or personal, to another, upon condition that his interest therein shall cease upon his becoming insolvent or a bankrupt, or upon the seizure of the same by his creditors, and limiting the same over; and in some cases it is held that such a transfer, without limiting it over, is valid: *Joel v. Mills*, 3 Kay & J., 458, 468; *Rockford v. Hackman*, 9 Hare, 475. So it may be accomplished by conveying such property to a trustee for the benefit of such person, with a provision that the title shall cease upon the happening of the event desired to be guarded against, such as bankruptcy, insolvency, or levy upon the same by creditors. This course is sanctioned by different elementary writers, and is stated to be strictly legal: 2 Redf. on Wills, 300; 3 Id. 496; Lew. on Trusts, 135; 4 Kent Com., 12th ed., 131, note.

Both of these courses have been repeatedly approved by the authorities, both ancient and modern, and are stated, in Jar. on Wills, 549, to be so well settled that no doubt can arise thereon. See, also, *Bramhall v. Ferris*, 14 N. Y. 41; *Nichols v. Eaton*, 1 Otto, 716; *Heath v. Bishop*, 4 Rich. Eq. 46; *White v. White*, 30 Vt. 338; *Leavitt v. Beirne*, 21 Conn. 1; *Easterly v. Kenney*, 36 Id. 18; *Keyser v. Mitchell*, 67 Pa. St. 473; *Nickell v. Handly*, 10 Gratt. 336; *Johnston v. Zane*, 11 Id. 552, 570.

RESTRAINT UPON ALIENATION.—This subject is discussed in the note to *Jackson v. Schutz*, 9 Am. Dec. 200. See also *McWilliams v. Nisly*, 7 Id. 654.

CONDITIONS IN CONVEYANCES.—This subject is also discussed in the note to *Jackson v. Schutz*, 9 Am. Dec. 202.

WILLIAMS v. INHABITANTS OF SCHOOL DISTRICT No. 1, IN LUNENBURG.

[21 PICKERING, 75.]

WHETHER A WARRANT UNDER WHICH A MEETING was called that elected a committee to levy a school tax is regular or not, can not be inquired into in an action to recover back money paid for the tax.

THAT SUCH COMMITTEE WAS A COMMITTEE DE FACTO is sufficient to sustain the tax.

WHERE TWO RECORDS OF A SCHOOL DISTRICT WERE KEPT, from only one of which it appeared that a committee had been duly elected at a meeting of the district, and the clerk who made the records testified that both were made by him soon after the meeting from loose memoranda kept at the meeting, it was held that the records were not contradictory, and both being originals, that the election of the committee was duly proved.

A CLERK OF A SCHOOL DISTRICT elected under the Rev. Stat., c. 23, sec. 27, is competent to act as such, although he has removed into an adjoining district in the same town, and another has been chosen in his stead, but not sworn.

RETURN OF A CONSTABLE upon a warrant issued to warn a town meeting, that he had warned the inhabitants to meet at the time named therein, dating his return less than fourteen days before the meeting, is not conclusive to show that the required notice of fourteen days before the meeting has not been given.

WARRANT FOR THE ANNUAL TOWN MEETING held by law, for the purpose of choosing officers, contained articles "to choose all necessary town officers," and "to choose all necessary committees," and the statute allowed either of two modes of choosing committees. It was held under these articles the town was authorized to determine which mode should be pursued, and to pass a vote, "that each school district choose their own committees," this being one of the modes provided by statuta.

WHETHER A COLLECTOR OF TAXES has been duly elected and sworn, is a question that is not open to a plaintiff in an action against a school district to recover a tax which he has paid such collector.

OMISSION, THROUGH ERROR OF JUDGMENT or mistake of law, of an assessor to assess on an individual a school district tax, does not invalidate the assessment as to other persons.

WHERE ONE OF THREE ASSESSORS FAILS TO ATTEND and act in assessing a tax, after proper notice, the other two may proceed without him.

EVIDENCE on the part of the plaintiff in an action against a school district to recover the amount of a tax paid for building a school-house, that there was already a sufficient school-house in the district, is inadmissible.

PROVISION OF THE REVISED STAT., c. 23, sec. 37, that an assessment of a school district tax shall be made within thirty days after the clerk of the district shall certify to the assessors the sum voted by the district to be raised, is directory, and does not prohibit an assessment after the expiration of that period.

ASSUMPSIT to recover back twenty-one dollars and ninety-one cents, paid by the plaintiff for a school district tax assessed upon him in 1836, as an inhabitant of school district No. 1, in Lunenburg. The facts are sufficiently stated in the opinion. The judge directed the jury to find for the defendants, which they did.

Brooks, in support of plaintiff's exceptions.

Torrey and Wood, contra.

By Court, **SHAW, C. J.** Assumpsit to recover back money alleged to have been illegally assessed upon the plaintiff as a school district tax. The case comes before the court upon exceptions to the decisions and directions of the court of common pleas in matters of law. Various exceptions were taken to the regularity of the meetings of the school district at which the tax was voted,

and those preparatory thereto, in order to show that the tax was not legally and rightfully assessed.

It was objected that the school district meeting, held April 11, 1836, was called by Thomas Spaulding, as the prudential committee, and that this was irregular because he was chosen at a meeting on June 13, 1835, called under a warrant issued by the selectmen, which did not recite that they had been applied to by members of the district to call such meeting. It did appear from evidence *aliunde*, that they had been applied to; but the court think it a sufficient answer to the objection, that Spaulding was the prudential committee man *de facto*, and that the regularity of the notice for the meeting, at which he was chosen, is not open upon this inquiry.

It was excepted, that it does not appear by the record, that Spaulding was chosen a committeeman. The answer to this, and we think it satisfactory, is, that there were two records of this meeting made by the proper officer, and each of equal validity. They are not contradictory; but in some particulars the one contains entries that the other does not. In one of the records, which is testified to be an original equally with the other, it does appear that Spaulding was chosen to this office.

The next exception was, that at a meeting held in April, 1836, Lamb was duly chosen as clerk, but was not qualified, the justices of peace who were present having refused to administer the oath. But in fact Lamb did not act as clerk at that meeting, but Whiting, the previous clerk, continued to act. But it is objected that Whiting was not qualified, because another had been chosen, because he had removed his residence beyond the limits of the district, and because he was chosen at a meeting irregularly called, the preceeding year. The last objection has been already substantially answered. In regard to his having removed out of the district, the case of *Barre v. Greenwich*, 1 Pick. 129, is much relied on. We think there is a manifest distinction in the two cases. The revised statutes, c. 23, sec. 27, provide that the district shall choose a clerk, to be sworn, etc., and who shall hold his office until another shall be chosen and sworn in his stead. The manifest intent seems to have been, that there should at all times be a recording officer, charged with the duty of keeping a record of the proceedings and votes of the district. In this case the district had proceeded to choose another, but until he was qualified, we think, by force of the statute, the former clerk was competent to act.

It was also objected, that the assessors, who assessed the tax,

were not chosen at a town meeting warned fourteen days before the meeting. Were this a valid objection, it is not supported by the proof. This is supposed to result from comparing the date of the return with the time of the meeting. But the date of the return is not conclusive of the time of service, and it does not appear that the warrant was not served fourteen days before the meeting.

Another exception was, that at the town meeting in 1835, it was voted, that each school district should choose their own prudential committee. It is objected that there was no article in the warrant to authorize this vote. It appears by the case, that this was the annual meeting, and there was an article in the warrant, "to choose all necessary town officers," and "to choose all necessary committees." This article in the warrant was sufficient, especially at the annual meeting, held by law, for the purpose of choosing officers. An article to choose all officers and all committees, is sufficient to warrant a vote, providing for the choice of an officer, in a mode provided by statute. To consider whether they will choose a particular officer, where two modes of doing it are authorized by law, is in effect to consider how they will choose him.

The next exception is, that Hadley the collector was not duly sworn, it being put against his name, "sworn," without stating what oath he took. But this is not a default for which the district is liable; he was an officer of the town, not theirs, and whether duly sworn or not is immaterial to them.

It is further objected, that the assessors intentionally omitted to tax Legate, one of the inhabitants of the district, because he was very poor, and they thought would soon come upon the town for assistance, though he was not then a pauper. If this was done through error of judgment or any error and mistake of the law in this respect, it does not invalidate the whole tax; and the case shows nothing more.

Another exception was taken, that the assessment was made by two only of the three assessors. It appears by the case, that the other assessor received notice and was requested to act with them, but refused to do so. Where a body or board of officers is constituted by law to perform a trust for the public, or to execute a power or perform a duty prescribed by law, it is not necessary that all should concur in the act done. The act of the majority is the act of the body. And where all have due notice of the time and place of meeting, in the manner prescribed by law, if so prescribed, or by the rules and regulations

of the body itself, if there be any, otherwise if reasonable notice is given, and no practice or unfair means are used to prevent all from attending and participating in the proceeding, it is no objection that all the members do not attend, if there be a quorum. In the present case, all three having had notice and an opportunity to act, the act of two is sufficient.

The defendant offered to prove that the district had one sufficient school-house, but the evidence was rejected. We know of no law which prevents a school district, when their school-house is in their opinion too small, or ruinous, or when by a change of districts, a school-house, though within the limits of the district, is in an inconvenient situation, or when from any other cause it is unfit for the purposes for which a school-house is intended, to vote to build another, before the former is actually taken down. The fact, therefore, if proved, would not show the tax illegal, and was rightly rejected.

The last exception is, that the tax was not assessed within thirty days. The statute is directory in this respect and not restrictive; and they are not prevented from assessing after the expiration of thirty days: *Pond v. Negus*, 3 Mass. 230 [3 Am. Dec. 131].

Exceptions overruled, and judgment of the court of common pleas on the verdict for defendants, affirmed.

Cited upon the following points: That the omission to tax any particular individual, who may be liable, does not render the whole tax illegal and void: *Watson v. Princeton*, 4 Metc. 601; *George v. Mendon*, 6 Id. 513. That certain statutes requiring the performance of certain acts, were directory merely: *Lowell v. Hadley*, 8 Id. 195; *Fanning v. Commonwealth*, 120 Mass. 390. That where a duty is imposed by law upon a public organized body, that such duty must be performed by the whole or a majority of the body: *Day v. Green*, 4 Cush. 439; *Ilsley v. Essex County*, 7 Gray, 465; *Weymouth v. County Com.*, 108 Mass. 145. That upon the question of the legality of a school tax it is sufficient if the meeting that levied the tax was called by those who were the prudential committee *de facto*: *Blackstone v. Taft*, 4 Gray, 253. That articles in a warrant for an annual town meeting, although general in their nature, are sufficient: *Sherman v. Torrey*, 99 Mass. 473. That an article in a warrant for a town meeting, "to choose all such officers for the year ensuing as the law directs," was sufficient to authorize the town to vote that the school district should choose their own prudential committee: *Kingsbury v. Quincy*, 12 Metc. 104. That the records of a town containing a copy of the warrant calling a town meeting, were competent evidence of the proceedings of the town: *Com. v. Shaw*, 7 Id. 55.

SIGOURNEY ET AL. V. SIBLEY ET AL.

[21 PICKERING, 101.]

WHERE AN APPEAL IS TAKEN from a decree of a probate judge, on the ground that he is interested in the estate and has therefore no jurisdiction to enter such decree, he is a competent witness to prove that he is not interested.

GRANT OF LETTERS OF ADMINISTRATION by a judge of probate, who has a valid claim against the estate, is void for want of jurisdiction, although he has determined not to enforce such claim.

ADMINISTRATION GRANTED by a judge of probate on an estate over which he has no jurisdiction, is not rendered valid by failing to take exception to his jurisdiction.

AUTHORITY CONFERRED BY STATUTE upon the probate court to make partition of the real estate of a decedent whose estate is in course of settlement, is merely incidental to the general probate jurisdiction over the estate, and if the grant of administration is void for want of jurisdiction an order of partition is likewise void.

COURT OF PROBATE HAVING NO JURISDICTION over an estate, but in which a special administrator has been appointed by a decree appealed from, and who acts by force of the statute during the appeal, is not the court of probate in which "the estate is settled, or in the course of settlement," within the meaning of the statute.

APPEAL from a decree of Ira Barton, judge of probate court, ordering a partition of the real estate of Andrew Sigourney, deceased, late of Oxford. The facts are stated in the opinion.

Washburn, for the appellants.

Merrick, for the appellees.

By Court, **SHAW, C. J.** The principal questions discussed in the present case are: 1. Whether the judge of probate was interested in the estate of Andrew Sigourney, deceased; and if so, 2. Whether this prevented him from having jurisdiction of the settlement of the estate of the intestate, and to what extent. The question arises rather incidentally in the present case, which was a petition to the judge of probate, by some of the heirs at law of the intestate, claiming title under him by descent, against others of the heirs at law, to have partition of the real estate.

The first question is, whether the judge of probate was interested, and whether the original grant of administration under his decree, was thereby void. In the case of *Cottle, appellant*, 5 Pick. 483, it was held, that being a creditor to the estate of a deceased person did render a judge of probate interested within the provisions of the statute. And we have no reason to ques-

tion the correctness of this opinion. On the administrator it depends to allow or disallow claims against the estate in the first instance, to prosecute and defend suits, and generally to act as a trustee for the benefit of creditors and distributees. Under such circumstances, a creditor has a direct interest in the appointment of an administrator. The revised statutes in this respect conform to the provisions of the former statute: Rev. Stat. c. 83, sec. 15. It provides that when a judge of probate shall be interested in any case, within his jurisdiction, it shall be transferred, etc.

The question then recurs, whether the judge of probate for this county was interested as a creditor in the estate of Sigourney, deceased. It appears that as the owner of a parcel of real estate, purchased of the assignees of Jonathan Davis, he had a valid claim against Sigourney for mesne profits, consisting of a year's rent of an estate claimed and recovered by the trustee of Judge Barton, and for his use, in a real action. We consider that it makes no difference in this respect, whether technically the action of trespass for mesne profits should be brought in his own name, or in the name of Bacon for his use. He considered the claim to be beneficially his. Bacon considered it so. It was for Judge Barton to say whether he should commence an action for these mesne profits or forbear to do so; and Mr. Bacon considered, that if recovered, they would be to Judge Barton's use. As to the nature of the claim, it seems to be one that Sigourney could not legally resist. He had levied an execution upon an estate purchased by Judge Barton, had taken actual possession under his levy, and held it one year, and let it, and received the rent. Then Judge Barton, by Mr. Bacon suing for his use, recovered the estate, and defeated Sigourney's levy, and then Sigourney became liable for the mesne profits.

Was this claim, in any lawful manner, defeated, waived, or extinguished, at the time that the petition for administration was presented? We see no legal objection to the competency of Judge Barton as a witness; we think he had no such pecuniary interest in the event of this suit, as to render him incompetent under the rules of the common law. But taking the facts as testified by him, the court are all of opinion, that they do not show any discharge or extinguishment of that interest. He states that having, through Mr. Bacon, applied to Sigourney for the mesne profits, he, Sigourney, felt hurt and offended, and thought it hard, that he should be called upon, because he had sustained losses on the same transaction: and when this was

reported to Judge Barton, he determined in his own mind, not to persist in the claim, and not to commence any suit for the same, and gave Mr. Bacon directions accordingly. But we think Judge Barton was right in the opinion which he expressed, that he still had a legal claim. His determination not to prosecute such claim, was in its own nature revocable. Even had he expressed such determination, it would make no difference, because a parol release, without payment or satisfaction, is no extinguishment of a debt. It may even be doubtful whether a release, executed after the decease of a debtor and before the appointment of an administrator, could legally avail, because there would be no one competent to accept such release. But this is immaterial, because no such release was executed. But there was a legal claim at the time of the decease of the intestate, and, there having been no release or discharge, payment or satisfaction, the claim remained in force, notwithstanding the determination of Judge Barton that he would not enforce such claim, and therefore he was interested in the estate, within the meaning of the statute, and could not take jurisdiction of the question of granting administration.

The court are also of opinion, that the jurisdiction is not aided by the consideration, that no exception was taken on this ground, and no application was made by the appellants, below, to remove the case to another county. It is a general rule, that want of jurisdiction, especially of a court of limited and special jurisdiction, can not be aided, by any waiver of exceptions, or even by express consent. If this is true in ordinary cases, it is so *a fortiori*, in a case of a probate decree, granting administration, which binds not only all those, who happen to be before the court as litigant parties, but all those, who as creditors, heirs, or otherwise, may be interested, directly or remotely, in the settlement of the estate.

But it was contended on the part of the respondents, that although the grant of original administration might be void, for want of jurisdiction, it did not follow as a necessary consequence, that the judge of probate might not have jurisdiction to grant partition, between tenants in common, claiming as heirs at law. This must depend upon the authority conferred upon courts of probate by statute, to make partition among heirs and devisees. The revised statutes, c. 103, sec. 50, provide, that the probate court, in which the estate of any deceased person is settled, or in a course of settlement, may make partition of all his real estate, lying within the state, among his heirs or devisees, and all persons holding under them.

We think this provision will admit of but one construction, which is, that this jurisdiction to make partition, amongst heirs and devisees, shall belong to the court of probate having the rightful and final jurisdiction of the settlement of the estate of the deceased. It is incident to the general probate jurisdiction of the estate of a deceased person. It is fit it should be so. It is most competent for that court to judge, whether real estate may be required as assets, and therefore to determine the expediency of making partition, amongst heirs and devisees, who in regard to creditors are to be deemed volunteers. There can be but one court of probate in the state, which has rightful jurisdiction of the settlement of an estate, and that must be the court having jurisdiction to make partition. Now when it is determined that the grant of administration was void for want of jurisdiction, it appears judicially that the court never had jurisdiction, and that the proceedings are void *ab initio*, except as to certain things, which it is for the benefit of all parties should be done, for the security and benefit of all concerned, and which when done, by a temporary administrator appointed for the purpose, are protected by the statute: Rev. Stat., c. 64, secs. 6, 7, 8, 9. Such special administrator can make no payment of debts or distribution of the estate, and is merely to collect and secure the property and deliver it over to a rightful executor or administrator when established by a final decree. We think, therefore, that a court of probate, in which such special administrator has been appointed, by a decree appealed from, but acting by force of the statute during the appeal, is not the court of probate in which the estate is settled, or is in a course of settlement, within the meaning of the statute.

The court are therefore of opinion, that the decree of the court of probate, ordering partition in this case, must be reversed.

For the same reasons, the decree of the court of probate, granting letters of administration on the estate of Sigourney, was reversed, on the ground that the judge of probate of this county was interested in the estate, and the proceedings remitted to the court of probate, to the end that application might be made by any person interested, to the probate court for the county of Middlesex, being the most ancient adjoining county, to grant administration on the estate of the deceased, according to the provisions of the statute: Rev. Stat., c. 83, sec. 15.

JUDGE OF PROBATE, WHO IS INTERESTED in an estate as a creditor or debtor, is disqualified to exercise any jurisdiction over the proceedings for its settlement,

Gay v. Minot, 3 Cush. 354; *Hall v. Thayer*, 105 Mass. 222; *Addrich*, appellant, 110 Id. 192, all citing principal case. Such interest, however, to render a judge disqualified, is not a mere possible contingent interest; not an interest in the question or general subject to which the matter requiring adjudication relates; but one that is visible, demonstrable, and capable of precise proof: *Northampton v. Smith*, 11 Metc. 395, also citing principal case. See *Sigourney v. Sibley*, also cited in *Sigourney v. Wetherill*, 6 Id. 557; *Emery v. Hildreth*, 2 Gray, 230; and *Jochumsen v. Bank*, 3 Allen, 91. The principal case is again reported in 22 Pick. 507, on another appeal, in which it was held that the decree of a judge of probate, appointing a special administrator on the estate of a person deceased in which such judge was interested, was void.

MERRIAM v. MIDDLESEX MUTUAL FIRE INS. CO.

[21 PICKERING, 162.]

ALTERATION IN PREMISES INSURED.—Where, in an action upon a policy of insurance issued by a company incorporated under an act which provided that if any alteration shall be made in any building by the proprietor thereof, after insurance has been made thereon by the company, whereby it may be exposed to greater risk from fire, the insurance shall be void unless an additional premium and deposit after such alteration be settled and paid to the company; but no alterations or repairs not increasing the risk shall affect the insurance, the jury were instructed, that the alteration must have been such that a higher rate of premium would have been demanded to insure the building in its altered state than before, otherwise the alteration would not be material, it was held that such instruction was correct, and that in case of a material alteration it was not necessary, in order to avoid the policy, for the company to show that the loss had been occasioned by the alteration.

ASSUMPT upon a policy of insurance against fire, to recover a loss which happened March 3, 1836. The building insured was in Lowell. It was a block of wooden houses, divided into two parts by a brick wall running east and west. The fire originated in the southerly part, which was consumed to the ground floor. The northerly part was but slightly burnt. The evidence as to whether the fire was occasioned by the negligence of the plaintiff or not, was conflicting. The instruction given by the court, to which plaintiff excepted, is stated in the opinion. Verdict for the defendant, and the plaintiff moved for a new trial for misdirection and because the verdict was against the evidence.

H. H. Fuller, for the motion.

Hosmer and Keyes, contra.

By Court, WILDE, J. The plaintiff moves for a new trial for a supposed misdirection to the jury in matter of law; and because

the verdict is against the weight of the evidence. The defendants, at the trial, relied on several grounds of defense, only one of which, however, is material in the decision of the present motion.

The ground on which the jury found their verdict was, that after the plaintiff had effected the insurance, and before the fire, the building insured had been altered by the tenants of the plaintiff, and with his consent, in such a manner as to expose it more to the hazard of fire, and that thereby the policy, by the terms of it, was rendered null and void. The evidence reported has a tendency to show that such an alteration had been made with the knowledge and the permission of the plaintiff, and thereupon the jury were instructed, that if they should be satisfied that any such alteration had been so made, it would avoid the policy; "but that the alteration must have been such, that a higher rate of premium would have been demanded, to insure the building, in its altered state, than would be demanded before such alteration; otherwise the alteration would not be material." To these instructions the plaintiff's counsel excepted, and they contend that no such alteration would avoid the policy, unless it could be shown that the loss was occasioned by the alteration. In support of this exception the case of *Stebbins v. The Globe Ins. Co.*, 2 Hall (N. Y.), 632, and other authorities, are relied on; but they are not applicable, as the terms of the policies in those cases and the present materially differ.

This policy was made in pursuance of sec. 13 of the defendants' act of incorporation (stat. 1825, c. 141), which provides, "that if any alteration should be made in any house or building, by the proprietor thereof, after insurance has been made thereon with said company, whereby it may be exposed to greater risk or hazard, from fire, than it was at the time it was insured, then in every such case, the insurance made upon such house or building shall be void, unless an additional premium and deposit, after such alteration, be settled with, and paid to, the directors; but no alterations or repairs, in buildings, not increasing such risk or hazard, shall in any wise affect the insurance previously made thereon." This being the contract between the parties in this particular, there can be no question that the instructions to the jury were perfectly correct.

In respect to the motion to set aside the verdict, as one against the weight of the evidence, we are of opinion, that the weight of the evidence is in favor of the verdict, and certainly not against it. The most that can be said in favor of the motion is, that the

evidence was in some respects conflicting, and upon such evidence the finding of the jury is not to be disturbed.

Judgment on the verdict.

Cited upon the following points: That if a risk is increased at the time a fire occurs, contrary to the terms of a policy of insurance, the insurers are not liable, even if the acts which increased the risk did not cause the fire: *Lyman v. Ins. Co.*, 14 Allen, 335. That whether a change in the occupation of premises insured is material to the risk, is to be tested by the question, whether underwriters generally would charge a higher premium: *Luce v. Ins. Co.*, 105 Mass. 302; See also *Luce v. Ins. Co.*, 110 Mason, 364.

HARRIS v. BROOKS, JUN.

[21 PICKERING, 195.]

PAROL DECLARATION BY THE HOLDER of a promissory note to a surety, after the note has become due, that he will exonerate him and look to the principal, is a good defense in an action by the holder against the surety. WHERE THE RELATION OF THE MAKERS is not apparent on the face of a note, parol evidence is admissible to prove that the defendant signed as surety, and that this was known to the holder at the time he declared that he would look to the principal for payment.

ASSUMPSIT on the following note: "Boston, August 16, 1832. For value received we promise to pay Abel Parker, or order, five hundred dollars in thirty days and grace. Reuben Damon, Isaac Brooks, jun." The note was indorsed by Parker, the payee. Evidence was introduced which tended to show, that the note was in the hands of one Barnard from the time it became due until 1835, and that it was an accommodation note to enable Damon to raise money. That when the note became due the defendant called on Barnard for the note, and said if he had to pay it he wished to attend to it soon, as he could then get security from Damon; that Barnard replied that Damon, having received the money on the note, ought to pay, and that he would look to him for its payment. Upon this evidence the court instructed the jury, that if the defendant was a surety, and this was known to Barnard when the above declaration was made, and if, in consequence thereof, the defendant omitted to take up the note and secure himself out of Damon's property, then defendant was discharged; and that the defendant might be deemed a surety if the original agreement between him and Damon was that the note was to be for the sole benefit of the latter, and he did in fact receive the whole proceeds of the note. Verdict for

the defendant, and plaintiff moved for a new trial for misdirection.

Farley and A. W. Austin, for the plaintiff.

Keyes, for the defendant.

By Court, SHAW, C. J. We are now to take it as found by the jury, under the instruction given them, that for several years after this note became due, Barnard was the indorsee and holder of it; that as between the two promisors, it was an accommodation note, that is, that the money raised upon it, was raised for the benefit of Damon and went to his use; that this was known to the holder; that after it became due, Brooks expressed a willingness to pay it, and if he was to pay it at all, wished to pay it then, because he could then get security of Damon, and that the holder then verbally discharged him, and agreed to look to Damon alone, recognizing him as principal.

The court are of opinion, that the instruction was correct, and that upon these facts, the defendant was not liable.

It is very true that an agreement between two promisors of a note, that the one shall take the whole of the proceeds and pay the whole note when due, can not affect the rights of the holder, unless he will take notice of it, and act upon it. The presumption, that two or more promisors of a note are equally responsible for its ultimate payment, so that if one pays the whole he shall have contribution, may be rebutted by showing that one signed for the accommodation and as surety for the other. So in this case, if upon the facts now proved, Brooks had paid the note, he would have had a remedy against Damon, not for a contribution only, but for an entire reimbursement. So if Damon had paid it, he would have had no claim on the defendant for contribution. So, where one of two promisors annexes the word "principal" to his signature, and the other "surety," these descriptions do not affect the terms of legal effect of the contract, they are equally bound to the promisee or indorsee as if such words of description had not been annexed. They indicate the relation in which the parties stand to each other, and notice of such relation to the holder. But the fact of such relation, and notice of it to the holder, may, we think, be proved by extrinsic evidence. It is not to affect the terms of the contract, but to prove a collateral fact and rebut a presumption. It goes to show, that the defendant was in fact a surety; and the rights of contribution result accordingly. Had the parties appeared on the note the one as principal, and the other

as surety, a parol declaration of the holder to the surety, that he would exonerate him and look to the principal only, is a good defense, on the ground, that it lulls the party into security and prevents him from obtaining his indemnity; and it would be fraud on the part of the holder, afterwards, contrary to such assurance, to call upon such surety. We think the same result follows where the fact is proved by other evidence. Here the assurance was given, after the note was due, by Barnard, who was the holder of the note, with full power of disposing of it. The present plaintiff having taken the note by indorsement, long after it was due, took it as a dishonored note, and liable to any defense which could be made to it, had the suit been brought by Barnard.

Judgment on the verdict for the defendant.

Cited upon the following points: That where two persons sign a note or other obligation for the payment of money, one may, by any competent evidence, show as against the other, that he was merely a surety: *Carpenter v. King*, 9 Metc. 515; *McGee v. Prouty*, Id. 552. That where the first indorser of a promissory note made payable to his order, is obliged to pay it, he may maintain an action for contribution against a subsequent indorser, on proving that by an oral agreement between the indorsers at the time of indorsing the note, they were, as between themselves, co-sureties: *Weston v. Chamberlain*, 7 Cush. 406. That declarations or admissions of the payee of a note are admissible to defeat a recovery thereon by one to whom the note has been indorsed when overdue; but that such admissions to be evidence have generally been made by the party while he held the note: *Bond v. Fitzpatrick*, 4 Gray, 92. See *Warren v. Hodge*, 121 Mass. 107, citing principal case and distinguishing it from that one.

PAROL EVIDENCE TO VARY EFFECT OF INDORSEMENT of negotiable instrument: *Hall v. Ely*, 9 Am. Dec. 381.

MIXER v. HOWARTH.

[21 PICKERING, 205.]

AMENDMENT OF COMPLAINT, WHAT PROPER.—Where a declaration contained a count for work and labor done and materials found, and the specifications of the plaintiff claimed the price of a carriage sold and delivered, an amendment thereto by filing a count upon an agreement by the defendant to take and pay for a carriage to be built to his order, is for the same substantive cause of action and is properly allowed.

AGREEMENT TO MANUFACTURE ARTICLE, NOT A SALE, WITHIN STATUTE OF FRAUDS.—Where the defendant went to the plaintiff's shop, who had on hand a carriage partly completed, and it was agreed between them that the latter was to finish a carriage for the defendant in a fortnight, and the unfinished one was completed accordingly, and the defendant notified thereof and requested to take it away, such agreement is not a contract of sale.

but an employment of the plaintiff to construct an article for his employer, and therefore not within the statute of frauds, and need not be in writing.

ASSUMPT by Mixer against Howarth, for work and labor and materials found. In the common pleas the plaintiff filed a specification claiming to recover two hundred and fifty dollars, the price of a buggy sold and delivered to the defendant. Plaintiff was allowed to file an additional specification, against defendant's objection, that it was not for the same cause of action, and not consistent with the original declaration. The nature of this amendment is stated in the opinion. The evidence of plaintiff showed that the defendant, in September, 1836, came into his shop and selected a piece of cloth for the lining of a buggy; that plaintiff then had on hand the body of a buggy nearly finished, but not lined; that in a conversation between them, it was understood that plaintiff was to finish a buggy for the defendant in a fortnight; that the unfinished one was completed accordingly, and defendant notified and requested to take it away, which he declined to do. Some evidence was also given as to the value of the materials used in finishing the buggy and of the plaintiff's work and labor thereon. Defendant moved for a nonsuit, because the contract, if any, was void by the revised statutes, c. 74, sec. 4; but the court was of a different opinion, and a verdict was taken for plaintiff, subject to the opinion of the whole court.

Hazen and Cummins, for the defendant.

L. Williams, for the plaintiff.

By Court, SHAW, C. J. The first question is, whether the amendment was rightly allowed. The original count was for a carriage sold and delivered, with counts for labor and materials, etc. And in the specification the plaintiff claimed the price of the carriage. The new count was upon an agreement by the defendant, to take and pay for a carriage to be built by his order and request.

The court are of opinion that these were for the same substantive cause of action, and that the amendment was admissible and rightly allowed. And in a similar case recently decided in England, Bailey, J., stated that in his opinion the plaintiff could not recover as for goods sold, because the property had not passed; but he also expressed his opinion, that on payment of costs, the nonsuit ought to be set aside, and the plaintiff allowed

to amend by adding counts on the agreement and for not accepting the goods: *Atkinson v. Bell*, 8 Barn. & Cress. 277.

But the main question is, whether this contract for the sale of the carriage was within the statute of frauds, and so void, if not proved by a note or memorandum in writing: Rev. Stat., c. 74, sec. 4. It is very clear, we think, that by this contract no property passed to the defendant. The carriage contemplated to be sold by the plaintiff to the defendant, did not then exist. It was to be constructed from materials, partly wrought indeed, but not put together. It was therefore essentially an agreement by the defendant with the plaintiff, to build a carriage for him, and on his part to take it when finished and pay for it, at an agreed or at the reasonable value. This is a valid contract and made on a good consideration, and therefore binding on the defendant. But it was not a contract of sale within the meaning of the statute of frauds, and therefore need not be proved by a note in writing.

When the contract is a contract of sale, either of an article then existing, or of articles which the vendor usually has for sale in the course of his business, the statute applies to the contract, as well where it is to be executed at a future time, as where it is to be executed immediately: *Cooper v. Elston*, 7 T. R. 14; *Sewall v. Fitch*, 8 Cow. 215. But where it is an agreement with a workman, to put materials together and construct an article for the employer, whether at an agreed price or not, though in common parlance it may be called a purchase and sale of the article, to be completed *in futuro*, it is not a sale until an actual or constructive delivery and acceptance; and the remedy for not accepting is on the agreement.

Judgment on the verdict.

CONTRACT OF SALE—AGREEMENT TO FURNISH LABOR, ETC.—DISTINCTION BETWEEN.—The rule adopted in the principal case, distinguishing between a contract of sale and an agreement to furnish labor, or to make and deliver an article, or quantity, or goods, and holding that the former is within the statute of frauds and the other not, has ever remained the law of Massachusetts, and the principal case has been repeatedly cited and followed: *Spencer v. Cone*, 1 Metc. 284; *Gardner v. Joy*, 9 Id. 179; *Lamb v. Crafts*, 12 Id. 356; *Blasdell v. Southier*, 6 Gray, 152; *Clark v. Nichols*, 107 Mass. 548; *Goddard v. Binney*, 115 Id. 454, all citing principal case. The effect of these decisions, is stated by the supreme court of Massachusetts, to be: "that a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute:" *Goddard v. Binney*, *supra*.

CARSLY ET AL. v. WHITE ET AL.

[21 PICKERING, 254.]

NO POSITIVE RULE OF LAW OR USAGE requires the master of a vessel to always exhibit in the night a light on his vessel while at anchor in a harbor.

WHETHER THE OMISSION TO EXHIBIT SUCH LIGHT will amount to such negligence as to bar a claim for an injury received from another vessel running foul of her, depends on the circumstances of the case.

ACTION on the case by the owners of a fishing-smack called the *Columbia*, against the owners of a vessel called the *Love*, to recover damages alleged to have been occasioned by the negligence of those who had charge of the latter vessel, in running against the former while lying at anchor in the harbor of Provincetown. It appeared that the *Columbia* was run into by the *Love* when entering the harbor for shelter. A number of other vessels were in the harbor at the time. The collision occurred in the evening at about eight o'clock. There was no light burning on the deck of the *Columbia*, and the evening was cloudy and misty, but it was light enough to discern a vessel at anchor a considerable distance. The jury were instructed, that to enable plaintiffs to recover, it must appear that the accident was not caused by any negligence or want of skill on their part. Defendants contended that plaintiffs, to recover, must show that they had a light on their deck; but the court instructed the jury, that whether they should have had such a light depended upon the circumstances of the case, especially the position of the vessel at anchor, and the state of the light from the heavens; that if the vessel was in the usual place of anchorage, and there was light enough to enable the running vessel, with a good lookout, to see and avoid the vessel at anchor, it was not necessary for the plaintiffs to keep a light on deck; but that if she was in an unusual or exposed place, and if it was so dark that a vessel at anchor could not be seen and avoided without a light on deck, it was carelessness not to have one; that what would be suitable and necessary precaution in one situation and state of circumstances, would be insufficient in another. Verdict for plaintiff.

T. G. Coffin, for the defendants.

Warren and Eliot, contra.

By Court, MORTON, J. We have no doubt of the correctness of the instructions to the jury. It was incumbent upon the plaintiffs to show that the injury, of which they complain, was

caused by the misconduct of the defendants, and did not arise from their own negligence or want of skill.

The liability of the owners of a vessel, for the negligence, ignorance, and misconduct of the master, while acting within his proper sphere, is undoubted. In cases of injury upon the land, occasioned by the collision of two carriages, or by the driving of the carriage of one against the person or property of another, it is well settled that the *onus probandi* is upon the plaintiff to show that he was using ordinary care and diligence; otherwise, it can not be known that the injury was not attributable to his own negligence: *Smith v. Smith*, 2 Pick. 621 [13 Am. Dec. 464]; *Thompson v. Bridgewater*, 7 Id. 188; *Lane v. Crombie*, 12 Id. 177; *Adams v. Carlisle*, 21 Id. 146; *Flower v. Adam*, 2 Taunt. 314; *Butterfield v. Forrester*, 11 East, 61; *Harlow v. Humiston*, 6 Cow. 191.

The same principle, somewhat extended, applies to collisions on the water. The master of a vessel, being selected by the owners for his nautical experience and knowledge, is responsible for himself, and his owners for him, not only for his negligence, but also for his want of skill: Marsh. on Ins. 495; Abb. Sh. 4th Am. ed. 99; *The Thames*, 5 Rob. Adm. 345; *The Neptune*, 1 Dod. 467; *The Woodrop Sims*, 2 Id. 83; *Dean v. Angus*, Bee, 369; *Purviance v. Angus*, 1 Dall. 180; *Bussy v. Donaldson*, 4 Id. 206; *Stone v. Kelland*, 1 Wash. C. C. 142; *Vanderplank et al. v. Miller et al.*, 1 Moo. & M. 169; *Vennall v. Garner*, 1 Crompt. & M. 21; *Luxford v. Large*, 5 Car. & P. 421; *Lack v. Seward*, 4 Id. 106.

We know of no positive rule or usage, requiring the master, always, in the night-time, to keep a light exhibited on his vessel, and operating like the rule of the laws of Oleron and of Wisbuy, which made it the duty of the master, always, when in port, to keep a buoy to his anchor, and rendered him liable for all damage caused by a neglect to do it: Laws of Oleron, art. 14; Laws of Wisbuy, art. 28, 51; see 1 Pet. Adm., appendix, 28, 78, 85. Whether common care and prudence required of the plaintiffs to have a light, and the omission to have it amounted to negligence, must depend upon the darkness of the night, the number and the situation of the vessels in the harbor, and all the other circumstances connected with the transaction. This is a question of fact, within the province of the jury. It was submitted to them with proper comments and instructions. They have decided it. And there is no reason to complain of their decision.

Judgment on the verdict.

Cited in *Robinson v. R. R.*, 7 Gray, 97; and *Hickey v. R. R.*, 14 Allen, 431, to the effect that in an action for damages for injuries caused by negligence, the plaintiff can not recover if his own negligence contributed to the result, and that he must show affirmatively that it did not.

VAN O'LINDA ET AL. v. LOTHROP.

[21 PICKERING, 292.]

LAND WILL NOT PASS AS INCIDENT OR APPURTENANT TO LAND.

WHERE THE OWNER OF A NARROW STRIP OF LAND, and also of the land adjoining it on the north and on the south, conveyed to the same grantee the land on the north and on the south, describing the one as land bounded by an "intended street," and the other as land bounded by a "street;" these words being used to designate the narrow strip, the fee in the latter does not pass by such conveyance, but the grantee has a right of way therein by implication or on the principle of estoppel.

WAY, REASONABLE USE OF, WHAT IS.—Persons who, in a populous town, erect buildings and fences on the line of a street, with doors and gates so constructed as when open to swing over it; or who, in constructing such buildings, place within the limits of the street building materials, and the earth dug from the cellar, if removed within a reasonable time, or spread earth on the street to improve it as a way, or allow horses and carriages to stand on such street, are not liable in trespass for such acts to the owner of the soil of the street.

TRESPASS *quare clausum*. The *locus in quo* was a small strip of land in New Bedford about forty feet in width and two hundred and eighteen in length, claimed by the plaintiffs under a deed from Charles Russell, dated October 30, 1834. Defendant claimed a right of way over it as a street and way appurtenant to his house and land, which adjoined it on the south. On December 26, 1833, Russell owned the land in dispute and also the land adjoining it both on the north and south. He erected a stone dwelling-house on the land on the north, and a barn on that on the south, which was afterwards made into a dwelling-house and occupied by the defendant. On that date Russell conveyed to the grantors of the defendant two parcels of land, one of which was described as bounded south on a "street," and the other upon the north on "an intended street." The *locus* was the land referred to in such deed as the "street." The court proposed to instruct the jury that the deed of Russell to defendant's grantors, supposing the fee did not pass, in the *locus*, gave them a right of way over it as appurtenant to the lots on the north and south thereof, and that this easement passed with the land to the defendant, and that he had a right to use it for all beneficial purposes for which a street or passage-

way might be used. To this plaintiffs excepted, and also contended that if the defendant did have such a right of way, yet that they might maintain the action because the defendant had used the *locus* for purposes and to an extent which his right of way did not warrant. The evidence upon this point and the instruction given are stated in the opinion. A verdict was taken for the defendant, subject to the opinion of the whole court.

Baylies and Ezra Bassett, for the plaintiffs.

Coffin and Colby, for the defendant.

By Court, MORTON, J. The defendant admits and justifies the entry and trespass. The plaintiffs claim the *locus in quo* in fee. The defendant claims a right of way over it. There is no doubt that the deed from Charles Russell to the plaintiffs, of October, 1834, covers the land in controversy. But prior to that deed, Russell, who was then seised of the land now owned by both parties, as well as of other land on the north of it, now owned by Edward Robeson, in December, 1833, conveyed to J. Ricketson and others the lots on the north and on the south of the *locus in quo*. One was bounded north "on an intended street," and the other, south on a "street." The defendant derived a title to the south lot from Ricketson and others, who conveyed the north lot to Robeson. These two lots are forty feet apart, leaving between them a strip of land forty feet wide and two hundred and seventeen or two hundred and eighteen feet long, which is the subject of this suit.

If the defendant can establish any right over the premises, it must be by virtue of the deed of Russell to Ricketson and others; and the true construction of that deed is the principal question in the case. It is supposed to be settled by the adjudged cases in this commonwealth, that in a line running to a road or bounded by a road, the road is excluded: *Clap v. McNeil*, 4 Mass. 589; *Alden v. Murdock*, 13 Id. 256; *Sibley v. Holden*, 10 Pick. 249 [20 Am. Dec. 521]; *Tyler v. Hammond*, 11 Id. 193. And yet there seems to be a great analogy between a boundary upon a river and upon a road. In the former case it is well settled that the *filum aquæ* is the true line, and that all the soil under the water vests in the adjoining proprietors, subject to the easement of the public in the river. And should the river be diverted, or for any cause cease to flow, the ownership of the land would become perfect for all purposes. A public highway is, in many respects, in its legal uses, similar to a river. It is not easy to see why two coterminous proprietors bounded upon a road or street, should

not take the fee to the center of the highway, subject to the public servitude. This doctrine is maintained by Chancellor Kent: 3 Kent. Com. 349, and is supported by the case of *Jackson v. Hathaway*, 15 Johns. 447 [8 Am. Dec. 263]. Perhaps the cases in our courts may all be sustained without any interference with the general rule, that land bounded upon the highway extends to the center of it, as laid down in New York and elsewhere. In some of the cases, if not all of them, the description was so specific as necessarily to exclude the ways. But whatever may be the correct general rule, we are satisfied that the deed to Ricketson and others excluded the land in question. The street did not then exist in actual use, but only in contemplation. If Russell had intended to convey the land between the two lots, there could be no possible reason for separating the land into two parcels, giving to each a separate boundary, limiting one by the north side of the proposed street and the other by the south side of it.

We are therefore of opinion, that the fee did not pass by that deed. It was not expressly granted, and it could not pass incidentally. Land will not pass as incident or appurtenant to land. As the purchasers of the estates on each side of the *locus in quo* did not acquire a right to the soil itself, it remains to be seen whether they acquired an easement over it. There was no express grant of a right of way. Nor did any way pass as appurtenant to the land granted, none then being in use or in existence. If the defendant acquired an easement in the land, it must have been by implication, or on the principle of estoppel. The doctrine laid down in *Parker v. Smith*, 17 Mass. 413 [9 Am. Dec. 157], seems to us to be a very reasonable and equitable one. That case, we think, was perfectly analogous to this; but if there be any difference, this is the stronger of the two. It was there said, that "the grantor and his heirs are estopped from denying, that there is a street or way to the extent of the land, on those two sides. We consider this to be not merely a description, but an implied covenant, that there are such streets." This opinion is decisive of this part of the case. A right of way vested in Ricketson and others; and they, by their deed, conveyed the same to the defendant.

But it is contended by the plaintiffs' counsel, that even if the defendant had a right of way, yet he so abused it as to become a trespasser. There is no doubt, that the owner of the fee of land, over which a way, public or private, exists, has a right to the enjoyment of any use of his estate consistent with the servitude to which it is subjected, and may maintain trespass for any interruption of his enjoyment: *Robbins v. Borman*, 1 Pick.

122; *Adams v. Emerson*, 6 Id. 57. The use of the way by the defendant which is complained of, consisted in placing gates and doors so near the street that when opened they swung over it; in suffering horses and carriages occasionally to stand in the street near his premises; in placing timber and other materials on the street preparatory to building a barn on his own land; in throwing earth out of his cellar on to the street for the purpose of removing it; and in spreading some earth on the street to make it more level and to make his own barn more accessible. This is alleged to be an unreasonable use of the way and such a one as amounts to a trespass.

What may be deemed a reasonable and proper use of a way, public or private, must depend much on the local situation, and much on public usage. The general use and the acquiescence of the public is evidence of the right. The owner of land may make such reasonable use of a way adjoining his land, as is usually made by others similarly situated. As to the reasonableness of the use, it may well be laid down, that in a populous town where land is very valuable, it is not unreasonable to erect buildings and fences on the line of the street and to place doors and gates in them, so as when opened to swing over the street. When the owner of a lot in such a situation has occasion to build, and for that purpose to dig cellars, he may rightfully lay his building materials and earth within the limits of the street, provided he takes care not improperly to obstruct the same, and to remove them within a reasonable time. It is very obvious that, without this privilege, it would be in some situations nearly or quite impracticable to build at all. If he be guilty of a wrong to any one, it is to the public, and not to the owner of the land. If he is guilty of a nuisance, he is answerable to the commonwealth. The spreading earth or gravel on a way with an honest intent to improve the way and make it more convenient for public use, and thereby actually improving it, is clearly no trespass on the owner of the land. Much less is it a trespass, occasionally to allow horses and carriages to stand in the street against or near a house. This is one of the appropriate uses of a highway. If this were to be deemed a trespass, very few of us would escape.

These were the substance of the instructions which were given to the jury. We think they were correct, and judgment must be rendered upon the verdict.

Cited upon the following points: That persons having a right of way adjoining their lands are entitled to make any reasonable use of such way: *Under*

wood v. Carney, 1 Cush. 292; *Fifty Associates v. Tudor*, 6 Gray, 260; *Codman v. Evans*, 5 Allen, 310. That what is a reasonable and proper use of a way, public or private, must depend on the local situation, and upon public usage: *Judd v. Fargo*, 107 Mass. 287. That a person who uses an easement for a purpose other than that for which it was created, exceeds his license, and is liable to the owner of the soil for a trespass: *Ganley v. Looney*, 14 Allen, 42. That if land is conveyed as bounding on a street, and the grantor has no interest in the adjacent land so described, this does not amount to an implied covenant that there is a street legally laid out: *Howe v. Alger*, 4 Id. 209. Where the owner in fee of a street, or who, as the owner of the adjoining land, has a right of way over it, conveys such adjoining land, the right of way passes by implication, although not named in the deed: *Brainard v. B. & N. Y. R. R.*, 12 Gray, 410; *Killion v. Kelley*, 120 Mass. 51. Where a grantor conveys land bounding it on a way or street, he and his heirs are estopped to deny that there is such a street or way: *Tufts v. Charlestown*, 2 Gray, 273. That where land is conveyed bounded on a road or running along the road, whether the road is to be excluded or not, depends upon the intention of the parties: *Parker v. Framingham*, 8 Metc. 267; *Phillips v. Brown*, 7 Gray, 24. Also cited in *Welch v. Wilcox*, 101 Mass. 164, that the owner of land over which a right of way "as now laid" has been conveyed has no right, in the absence of evidence of a contrary usage, to erect a gate at the entrance of the way, or to narrow the passage by gate-posts.

RIGHTS AND REMEDIES OF A PERSON OVER WHOSE LAND A HIGHWAY PASSES. In the note to *Mayhew v. Norton*, 28 Am. Dec. 303, the subject was considered at length.

MATRICK v. LINFIELD ET AL.

[21 PICKERING, 325.]

WHERE A FATHER GAVE HIS DAUGHTER, then of age and living in his family, a female calf, if she would bring it up, which she did, and it was fed on her father's farm, and after it became a cow the milk was used in his family, and no charge was made for the daughter's board, or for the keeping of the cow, nor by the daughter for her work or the milk of her cow, it was held that there was sufficient proof of a gift and delivery to the daughter as against a creditor of the father.

TRESPASS for taking the cow of plaintiff. At the trial it appeared that the animal in question was, when a calf, given to the plaintiff by her father, and that she brought it up by hand. That plaintiff was of age, and lived in her father's family when the calf was given to her, and that it was brought up on the father's farm, being fed by his hay and pasturage. That when taken by the defendants, in the fall of 1836, it was six years old. The milk from the cow was used in the father's family, and nothing was ever paid by plaintiff for her board, nor did she ever demand anything for her work on the farm. The defendants took the cow away and sold her, to pay a tax due from the plaintiff's father, although notified that she belonged to plaintiff.

and forbidden to take her away. Verdict for plaintiff. The defendants contended that there was no evidence of a gift or delivery of the cow to plaintiff. If the court was of that opinion a new trial was to be granted, otherwise judgment was to be entered on the verdict.

Ellis Ames, for the defendants.

King, *contra*.

By COURT. There was sufficient proof of the gift and delivery, to show property in the plaintiff. If this is in any degree controlled by the proof of the daughter's living with her father and bringing up this cow on pasture and fodder supplied by him, the inference to be drawn from that proof is sufficiently rebutted by the facts, that she contributed the milk of the cow and her own labor, to the general support of the family, which may be taken as a fair compensation for the keeping of the cow.

If fraud had been relied on, it should have been distinctly averred and put in issue.

Judgment on the verdict.

GIFTS.—To be valid there must be a delivery of the property given: *Noble v. Smith*, 3 Am. Dec. 399; *Bullock v. Tinnen*, 6 Id. 562; *McDowell v. Murdoch*, 9 Id. 684; *Reid v. Colcock*, Id. 729. In *Buller v. Scofield*, 20 Id. 211, it was held that a deed of gift from a father to his children, of all the estate which he owned at the date of the deed, "or shall own at his death," does not pass money of which the father died possessed, not even if he was possessed of the money at the date of the deed. Where a father permits property to go into possession of a child upon its marriage, a gift will be presumed: *De Graffenreid v. Mitchell*, 15 Id. 648.

PRESCOTT v. WHITE.

[21 PICKERING, 341.]

RIGHT TO ENTER ON LAND TO CLEAR DITCH OR CANAL.—Where one is the owner of an ancient mill to which there has been attached a race-way, being an artificial canal for conducting off the water from the mill, and without the free and unobstructed current of which the mill could not be worked, and such canal has from time immemorial passed through the land of another, and there is no grant or contract regulating the rights of the parties, the owner of the mill has a right to enter upon the land through which the race-way passes and to clear out the obstruction therefrom in the usual and ordinary mode in which such canals are cleansed, doing no unnecessary damage.

WHERE SUCH A CANAL HAS PASSED THROUGH the land of another from time immemorial, it is evidence of an antecedent grant from the owner of the

land to the owner of the mill, to construct and keep such a canal, and to make the beneficial use of it for which it was obviously intended.

LAW PRESUMES IN THE ABSENCE OF A GRANT or contract, that the party who enjoys the benefit of an easement is to keep it in repair, and where such easement is a canal passing through the lands of another, the person who has the benefit thereof has the authority and license to enter upon such land and clear the canal in a reasonable and proper manner.

WHETHER IT IS THE RIGHT OR DUTY of a mill owner, in cleansing a race-way which passes through the lands of another, to place the materials taken out on the adjoining bank or to carry them off, depends on the nature of the materials and other circumstances in the particular case.

TRESPASS *quare clausum*, for entering and digging out the race-way from the defendant's mill, where it runs through the plaintiff's land. The judge instructed the jury that the defendant, as owner of an ancient mill above, and an artificial race-way as appurtenant to or connected with it, had the incidental right to enter upon the plaintiff's land and clear out the race-way in the ordinary and usual method, and to throw the materials so cleared out upon the banks of the same, doing no unnecessary damage. No evidence was introduced to show that the defendant or the former proprietor of the mill had ever before entered upon the plaintiff's land to clear out the race-way, or that they had ever cleared it out before. Plaintiff excepted to the instruction, which, if erroneous, a new trial was to be granted.

Mann and Clarke, for the plaintiff.

Simmons and Cushing, contra.

By Court, **SHAW, C. J.** As we understand the direction of the judge, we are of opinion that it was correct. There is a slight ambiguity in the report of the instruction to the jury. It was taken for granted, and it seems to have been so understood at the argument, that the usual and ordinary method of clearing out similar race-ways in the country, is to pass over the grounds through which such race-ways are conducted, and remove that portion of material which has fallen into it and place it upon the adjoining bank. The effect therefore of the rule adopted by the judge and applied to the actual circumstances of this case was, that where one is the owner of an ancient mill, to which there has been attached a race-way, being an artificial canal, for conducting off the water from the mill, and without the free and unobstructed current of which the mill could not be worked, and such canal has from time immemorial passed through the land of another; and there is no grant or contract regulating the rights of the parties, the owner of the mill has a right to enter

upon the land through which the race-way passes, and to clear out the obstructions therefrom, in the usual and ordinary mode in which such canals are cleansed, doing no unnecessary damage, and that if the defendant had so done, it would have been a good justification for entering the plaintiff's land and clearing out the race-way.

In the first place it must be taken, according to established rules of the law, that the run of such a canal through the land of another, for the time stated, is evidence of an antecedent grant from the owner of the land to the owner of the mill, to construct and keep such a canal, and to make the beneficial use of it for which it was obviously intended. It must be also taken as an inference of law, in the absence of a grant or contract, that the party who enjoys the benefit of the easement is to keep it in repair: *Taylor v. Whitehead*, 2 Doug. 744. When the use of a thing is granted, every thing is granted by which it may be enjoyed: *Pomfret v. Riccroft*, 1 Wms. Saund. 323, and note 6. It follows as a necessary consequence, that the non-appearing grant carried with it to the grantee the right to do all necessary and proper acts to keep the race-way in a condition fit for the purposes for which it was intended. If it passes through the grantor's land, it carries an implied authority and license to enter upon the land to examine and clear the canal in a reasonable and proper manner, and of what is reasonable, the usual and customary mode is good evidence.

As to placing the materials taken from the bed of the stream, on the adjoining bank, the right and the duty to do so may depend upon circumstances. If the canal is walled up, and the stones have fallen in, it would seem to be the right and the duty of the mill-owner, in removing the stones from the bed of the race-way, to replace them on the wall of the ditch. If the material be soil, which has fallen from the adjoining bank, and which may be useful or beneficial to the owner of the land, for the purpose of enriching the soil or otherwise, it would be the duty of the mill-owner to place it on the bank for his use. But if it be material not useful or beneficial, it would be the duty of the mill-owner to remove it off the land in a reasonable time, and in a manner least prejudicial to the owner of the land.

We consider that this rule would not apply to a case where the mill-owner owns the land upon either side of the mill-race; there he may make use of his own land, and no grant from the owner will be presumed, being not necessary to the use of his mill. Nor will it apply to a case, where the rights of the parties

in this regard, are regulated by any express grant or contract. Nor will it apply to cases, where another and different mode of keeping such race-way clear of obstruction, has for a long time been used and practiced.

We consider the incidental right of entering to keep the race clear of obstructions where it passes another's land, to arise from the principle of presumed grant, and the terms, limitations, and extent of such grant, must be determined from the obvious purposes, for which the easement is designed, and to which it is adapted, and upon the manner in which it has been in fact used in past time, if any such use has been shown. But we do not consider it necessary for the defendant to show actual previous entries and clearings to establish the right, because no such clearing may have been necessary, within time of memory. But in the absence of such instances of actual entry and clearing, the obvious necessity and fitness of doing so, in order to enjoy the principal right granted, must be proved, from which a grant of the incidental privilege may be inferred.

Motion for a new trial overruled.

Cited in *Prescott v. Williams*, 5 Metc. 432; *Richardson v. Bigelow*, 15 Gray, 156; and *White v. Chapin*, 12 Allen, 519, 522.

DANIELS v. POND.

[21 PICKERING, 367.]

WHERE A TENANT AT WILL COMMITS WASTE, it is a determination of the will, and an act for which trespass *quare clausum fregit* will lie by the reversioner.

MANURE MADE ON A FARM in the ordinary course of husbandry, consisting of the collections from the stable and barnyard, or of composts formed by an admixture of these with soil or other substances, is by usage, practice, and general understanding, so attached to and connected with the realty, that in the absence of any express stipulation on the subject, an outgoing tenant at will of the farm has no right to remove the same or to sell it to be removed.

SALE THEREOF BY SUCH TENANT vests no title in the vendee, and is a tort for which the landlord may have redress.

THIS RULE DOES NOT APPLY TO MANURE made in a livery stable, or in any manner not connected with agriculture or made in the ordinary course of husbandry.

TENANT AT WILL OF A FARM IS ENTITLED to the possession of the manure made thereon in the ordinary course of husbandry, for the purpose of using it on the farm; but if he sells it, the right of possession thereto vests in the lessor or his grantee, and they may maintain trespass *de bonis asportatis* against the vendee for removing it.

TRESPASS. The first count was for breaking a close and carrying away a quantity of manure. The second was *de bonis asportatis* for the same property. In December, 1836, the farm from which the manure was taken, was conveyed by Ira Blake to the plaintiff. At this time one Nason was tenant of the farm under a parol lease from Blake, by the terms of which he was to hold from April 1, 1836, to April 1, 1837. The manure in question had accumulated in the barnyard and stable of the farm where Nason's cattle were fed, and in the autumn or winter of 1836, was taken by the latter to the highway adjoining the farm, and in March, 1837, sold by him at auction to the defendant. Before the sale notice was given by the plaintiff and Blake that the former owned the manure; and defendant, with such notice, purchased it, and in April, 1837, carried it away. If upon these facts plaintiff was entitled to recover, judgment was to be entered in his favor, otherwise he was to be nonsuited.

Metcalf, for the plaintiff.

Merrick, for the defendant.

By Court, SHAW, C. J. Two questions arise in the present case; the first as to the form, the second, as to the plaintiff's right of action.

1. The tenant in this case was tenant at will; and it seems a well-settled rule, that if a tenant at will commits waste, it is a determination of the will and an act of trespass, and that *quare clausum fregit* will lie by the reversioner: *Phillips v. Covert*, 7 Johns. 1; *Suffern v. Townsend*, 9 Id. 35.

It was further contended, that the plaintiff had not such a possession of the manure as would enable him to maintain trespass *de bonis asportatis*. The plaintiff, by the purchase, had become owner of the farm with all its incidents, subject only to the tenancy at will of Nason. If the manure became the plaintiff's at all, it was as part of and incident to the realty. Nason had a qualified possession of it for a special purpose only; that is, to be used upon the farm. The moment he sold it, the act was an abandonment of that special purpose, he parted with his only right to the possession or custody of it, it vested in the plaintiff as owner of the freehold, and the right of possession followed the right of property: *Farrant v. Thompson*, 5 Barn. & Ald. 826; *Walcot v. Pomeroy*, 2 Pick. 121; *Ayer v. Bartlett*, 9 Id. 156. As the tenant's sale conveyed no title to the defendant, the action of trespass well lies against him, if the property was the plaintiff's.

2. The court are of opinion, that manure made on a farm, occupied by a tenant at will or for years, in the ordinary course of husbandry, consisting of the collections from the stable and barnyard, or of composts formed by an admixture of these with soil or other substances, is, by usage, practice, and the general understanding, so attached to, and connected with the realty, that, in the absence of any express stipulation on the subject, an out-going tenant has no right to remove the manure thus collected, or sell it to be removed, and that such removal is a tort, for which the landlord may have redress; and such sale will vest no property in the vendee: *Lassell v. Reed*, 6 Greenl. 222; *Kittredge v. Woods*, 3 N. H. 503 [14 Am. Dec. 393]. The authority of the first of these cases is supposed to be impaired by a subsequent one, decided by the same court: *Staples v. Emery*, 7 Greenl. 201. But the court do not profess to call in question the correctness of their former decision, but, on the contrary, affirm it, and distinguish the latter case from it. The rule here adopted will not be considered as applying to manure made in a livery stable, or in any manner not connected with agriculture or in a course of husbandry.

In the present case, the defendant had notice both from Blake and from the plaintiff, of the claim and title of the plaintiff to the manure, before the sale; he therefore stands in the same situation with Nason, neither better nor worse.

Judgment for the plaintiff.

Cited upon the following points: That the decision in the principal case was placed upon the ground of public policy: *Lewis v. Lyman*, 22 Pick. 442. That the right to possession of property in the hands of a bailee vests in the bailor upon the former violating the terms of the bailment: *Wade v. Mason*, 12 Gray, 336. That manure made in the course of husbandry upon a farm, passes as between landlord and tenant, by a conveyance of the farm as appurtenant to it: *Fay v. Mussey*, 13 Id. 55. See *Fletcher v. Herring*, 112 Mass. 384.

MANURE AS A FIXTURE.—Manure lying about a barn passes to a grantee of the land as an incident thereof, unless reserved in the deed: *Kittredge v. Woods*, 14 Am. Dec. 393; see note to this case discussing this subject at length; also the note to *Gray v. Holdship*, 17 Id. 690, and cases there cited.

ORBOK ET AL. v. COMMONWEALTH INS. CO.

[21 PICKERING, 456.]

TESTIMONY BY ONE SURVEYOR OF THE DECLARATIONS AND OPINIONS OF ANOTHER, while engaged in making a survey of a vessel in a foreign port, which has been injured, is inadmissible on the part of the insured in an action against the insurers of the vessel, it appearing that the deposition of such other surveyor is in the possession of the former.

EVIDENCE IN SUCH AN ACTION upon the question whether the cost of repairs would exceed half the value of the vessel, that she would have been of less value after being repaired than she was before the injury, is inadmissible.

WHERE THE INJURY SUSTAINED BY A VESSEL insured is not of such a nature and extent as to warrant an abandonment, it is not such a case of necessity as will warrant a sale by the master.

VALUATION OF A VESSEL IN A POLICY OF INSURANCE is conclusive as to her value, in determining whether the expenses of repairing an injury sustained by her will exceed half her value and thus constitute a technical total loss.

WHERE A POLICY OF INSURANCE PROVIDES that the insured shall not have a right to abandon unless the loss exceeds half the amount insured, and the valuation in the policy includes the premium, the loss must exceed one half the whole valuation, including the premium, to authorize an abandonment.

WHERE IT IS NECESSARY TO RAISE MONEY at marine interest for the purpose of repairing a vessel insured, the rule of deducting one third new for old, is to be applied to such interest, in determining the amount for which the insurers are liable.

VESSEL'S PROPORTION OF ITEMS OF GENERAL AVERAGE is not to be added to the partial loss, in order to make up the loss of fifty per cent., which authorizes an abandonment.

AN INSTRUCTION TO THE JURY IN AN ACTION upon a policy of insurance, the question being whether the loss was partial or constructively total, that if they found for a total loss, to state the item of damage which in their opinion exceeded one half the sum insured, is not erroneous or irregular.

WHERE, AT THE TRIAL of an action against an insurance company, it appeared that the sheriff, who had returned a talesman to serve on the jury, was a stockholder in such company, and this was known to plaintiff's counsel soon after the trial began, but no objection was made until some time after, this was held to amount to a waiver of any exception to the competency of such juror.

ASSUMPSIT upon a policy of insurance on the brig Rolla. It was admitted that defendants were liable for a partial loss, but plaintiffs claimed a total loss. The insurance was on time, and on February 9, 1835, during the time covered by the policy, the Rolla struck upon a rock in the Mediterranean sea, while on a voyage from Barcelona to Vera Cruz, and from her injuries and from the violence of the wind was compelled to go into Malaga, and upon a report made by surveyors she was sold by the captain at auction. The cargo consisted of wines and other articles not perishable. The Rolla was abandoned to the defendants August 5, 1835, and there was evidence that the captain arrived in Boston on the tenth of the preceding July. It was contended that the abandonment was in season to entitle the plaintiffs to claim for a total loss, but it was ruled that as the captain had

arrived July 10, the abandonment was not in season, and that plaintiffs could not recover for a total loss unless the sale was valid. The facts necessary to an understanding of the points are detailed in the opinion. A verdict was rendered as for partial loss.

Sprague, Simmons, and Gay, for the plaintiffs.

Choate and Sewall, for the defendants.

By Court, PUTNAM, J. This was assumpsit upon a policy of insurance on the brig Rolla. The plaintiffs claimed to recover on the ground, that there was a technical total loss, arising from a sale of necessity. They do not contend before the whole court, as they did at the trial, that there was a reasonable abandonment. They can recover only for a partial loss, unless there was a necessity to make the sale of the vessel, in which case an abandonment is not required. The verdict was for a partial loss only; and the plaintiffs move for a new trial for various reasons, which will be now briefly considered.

And first, they insist that they ought to have been permitted to read that part of the depositions of David Bartlett and John Lengo, which stated the sayings and opinion of one Madueno, who was one of the surveyors associated with Bartlett and Lengo, notwithstanding they had the deposition of Madueno taken for this cause, which they might have used if they had pleased. They contended that they were not obliged to use the deposition of Madueno, and that his declarations made to Bartlett and Lengo, were to be considered as *res gestæ*, as a matter of advice given to the plaintiffs, on the occasion when he was called to act as a surveyor. But we can not see the matter in this light. It would be just as competent to have had the sayings and opinions of the other surveyors proved by some person who heard them, instead of being proved by the surveyors themselves; and if such a course were allowable, the whole survey might be proved by hearsay, instead of being proved by the oaths of the surveyors. We think, that it was not competent for Bartlett and Lengo to state the sayings and opinions of Madueno. But if this point were less clear than it is, we do not think the plaintiffs could maintain their objection, inasmuch as they afterwards produced the deposition of Madueno. They are not to have the benefit of the deposition with the jury, and the benefit of Bartlett and Lengo's statement of Madueno's declarations and opinions, as matter of law, also. The introducing the better evidence of Madueno himself, was a virtual waiver of the

evidence of his declarations. We think the ruling of the judge who tried the cause was correct upon this matter.

At the trial, the plaintiffs' counsel, on cross-examination of a witness, proposed this question: "As this vessel and the injury to her have been described, would she, after being repaired, be of less value than before the injury happened?" The plaintiffs offered to give evidence, that such was the fact; but the judge rejected it as inadmissible. The rule for which the plaintiffs contended would be uncertain, arbitrary, visionary, and impracticable, enlarging or contracting, just as there might or might not be evidence enough without it to induce the jury to charge the underwriters. It is analogous to the claim of a general strain, which has been sometimes put forth to make out a case against insurers. The court of Connecticut, in the case of *Sage v. Middletown Ins. Co.*, 1 Conn. 239, very justly say, that such a rule of evidence "would open the door to infinite fraud, imposition, and uncertainty, and put an end to all that is valuable in insurance."

We have seen some practice under the assumption of this principle, in the case of *Peele v. Suffolk Ins. Co.*, 7 Pick. 254 [19 Am. Dec. 286]. It was necessary, in that case, that the expenses of the repairs should exceed six thousand dollars. I have now before me the items returned by the jury for that purpose; and the last is "damage of leak and straining of vessel, not otherwise provided for, one thousand five hundred dollars;" so, making up an amount of six thousand one hundred and ninety-one dollars and thirty-five cents. It was in giving the opinion in that case, that Chief Justice Parker observed, that there had been "a straining of the cause as well as of the vessel, in order to charge the underwriter." And such, we fear, would be the practical operation of the rule contended for by the plaintiffs in the case at bar. However substantially the ship may have been repaired within the fifty per cent., the imaginary deterioration would be reason enough to throw the whole loss upon the underwriters. We think that the ruling of the judge was right upon this point.

Whether the damage was of such a nature as to warrant an abandonment, was a question contested by the parties at the trial; and the judge ruled, and, as we think, correctly, that if the loss was not of such nature and extent as to warrant an abandonment, it was not such a case of necessity as would warrant a sale by the master. The plaintiffs also contended, that if the master could not make complete repairs at Malaga for less

than one half of the value of the vessel, but could have made partial repairs at Malaga, and then have carried his vessel to Gibraltar, and there have made complete repairs, and the whole expense would not have exceeded the one half of such value, the master was not bound to have made such partial repairs at Malaga, and to have gone to Gibraltar for complete repairs. The judge was of a different opinion, and instructed the jury accordingly. And the counsel for the plaintiffs very properly now abandon that point: *Vide Hall v. Franklin Ins. Co.*, 9 Pick. 466, 483.

It was contended for the plaintiffs, that the valuation in the policy was not conclusive, but that they had a right to show, that the vessel was of less value, and especially, that she was of less value at Malaga, the port of necessity. We think that the ruling of the judge was correct upon that point. If there had been a total loss in fact, the value in the policy would be the sum which the underwriter must pay, notwithstanding the vessel might have greatly deteriorated after the commencement of the voyage, and before the loss. And why the agreement of the parties should be held good in the case of an absolute, and void in the case of a technical total loss, we have not been able to see. The point was decided in *Deblois v. Ocean Ins. Co.*, 16 Pick. 303 [28 Am. Dec. 245], which case we have revised and confirmed. It was contended by the plaintiffs' counsel, that if the valuation in the policy was conclusive, still the premium should be excluded, and that the excess of one half, to authorize an abandonment, was of the one half exclusive of the premium; that as this valuation was eight thousand dollars, including premium of seven per cent., it was the excess of one half of seven thousand four hundred and forty dollars, which was requisite to constitute a technical total loss. Now we think this point is very clearly settled by the following clause in the policy: "It is agreed that the insured shall not have the right to abandon the vessel for the amount of damage merely, unless the amount which the insurer would be liable to pay under an adjustment as of a partial loss, shall exceed half the amount insured."

The clause was introduced after the long litigation in the case of *Peele v. Suffolk Insurance Company*, 7 Pick. 254 [19 Am. Dec. 286], and was intended, without doubt, to provide by agreement for the construction which the underwriters contended to be right, in those cases relating to the Argonaut. They intended, that the value in the policy should be the rule upon which the

calculation should be made; and they intended, that one third new for old should be deducted, and that if the loss exceeded one half of the value in the policy, or (as it is expressed) of the amount insured, then it should be a constructive total loss. Now the amount insured on the ship, by this policy, is eight thousand dollars; and it is said expressly, that that sum includes the premium. How then can we undertake to exclude it by construction, and say that seven thousand four hundred and forty dollars is the amount of the sum insured? The premium made a part of the value insured; it was an insurable interest, as much as was the ship itself; and the calculation must be made accordingly.

But it is contended, that in calculating whether or not the loss of five per cent. has happened on the ship the premium is to be excluded, and that the same rule should be adopted in ascertaining the loss of fifty per cent. as of five per cent.: *Brooks v. Oriental Insurance Company*, 7 Pick. 259. The rule excluding the premium from the aggregate value, in the calculation of the percentage of damage to articles enumerated in the memorandum clause, was adopted from what was understood by the court to be the prevailing usage in adjustments of partial losses under that clause. Independently of the usage, the premium might well be considered as included in the aggregate value: 1 Ph. Ins. 311; 2 Id. 213.

But the meaning of the clause in the policy concerning the right to abandon on account of damage exceeding fifty per cent. of the amount insured, is too plain for construction or explanation. The premium is expressly made to be part of the amount insured, and the damage to be paid must exceed half that amount, calculating the same "as under an adjustment of a partial loss;" that is, by deducting one third new for old, from the expenses of the repairs. That deduction was certainly the ancient mode adopted in England. *Weskett*, tit. Average, sec. 15, speaks of it as a general custom. The rule has however been modified in that country. It is not applied there when the damage happens upon the first voyage; upon the ground, that the reason of the rule in that case fails, for that a new and good vessel can not be made better by new repairs, than she is presumed to have been before she received the damage: *Fenwick v. Robinson*, 3 Car. & P. 323. We have held to the old rule, however, in *Sewall v. United States Ins. Co.*, 11 Pick. 96, which was a policy upon a new ship. And such is the rule in New York: *Dunham v. Commercial Ins. Co.*, 11 Johns. 315 [6 Am. Dec. 374]. *Vide* 3 Kent

Com., 3d ed. 339, note. And it seems to us that the rule should have a general application to all vessels, so that on the whole there would be a just practical result.

It has been contended for the plaintiffs, that the marine interest which was necessarily paid, should be allowed towards the partial loss without any deduction of one third. But it seems to us, that where there was a necessity to raise money at marine interest, it must be considered as a measure which increased the expenses incurred. The repairs cost just so much more on that account; and from the whole amount of their cost, the deduction of one third should be made. And upon the same principle it is, that the commissions which are paid, and the exchange on which funds are raised, are to be taken into the account and borne by the party liable to make the repairs: *Vide Benecke on Ins.*, Phillips' ed. 169; *Humphrey v. Union Ins. Co.*, 2 Ph. Ins. 245. And it was argued for the plaintiffs, that in calculating the fifty per cent. the vessel's proportion of all the items of general average was to be included, and if not all, certainly the expense of getting the vessel into Malaga and of the first survey and expenses incident thereto, and of unloading the cargo, and the hire of the vessel into which it was put, and of pilotage and lighterage, boat hire, wages, provisions, and consul's fees.

Now it is not contended but that all those items (excepting the first, perhaps, viz.: the expense of getting the vessel from where she received the damage to Malaga) are proper charges to be brought into general average; and the question is, if any of them should be taken to make up the particular average. It was said, that the expense of getting the vessel from the place where she was injured to Malaga, including especially the wages of eight extra seamen at Roquetas, came within *Sewall v. United States Ins. Co.*, 11 Pick. 92. In the case cited, it was stated by the chief justice, that the expense of raising a ship which had sunk, was to be a direct charge to the owner, and that as the vessel and cargo happened to be so situated that they could be saved together, the expense was very properly and equitably apportioned upon their relative owners. That was said not to be technically a general average, but in nature of a general average. I instructed the jury in regard to that point as the plaintiffs' counsel requested. But speaking for myself, upon more reflection, I am disposed to think, that the employment of the eight seamen to assist in pumping and navigating the vessel from the place where she was injured to Malaga, should have been con-

sidered to have been strictly a charge to the general average. I can not now see any reason for making a difference between the expense of those extra seamen, and the wages of the crew and various other expenses incurred for the common good: *Vide Potter v. Ocean Ins. Co.*, before Story, J., circuit court of U. S., Oct. t., 1837; *Stevens & Benecke*, Phillips' ed. 76; *The Copenhagen*, 1 Rob. Ad. 289; *Birkley v. Presgrave*, 1 East, 227; *Padelford v. Boardman*, 4 Mass. 548. But, as was before intimated, the plaintiffs have no reason to complain of the charge upon that point.

And in regard to the other items which are technically general average charges, it is entirely clear, that they are not to be taken, to make up the particular average account. They were incurred to place the ship, etc., in a condition to be surveyed and examined. Those expenses must be paid, whether the repairs should be made or not; and they have no tendency to show how much it will cost the owner of the ship to repair it. The particular average loss (as is well known) is to be borne by the owner of the ship; the general is to be sustained by the ship, cargo, and freight. Now, by a clause in this policy, it is provided, that the company shall not be answerable for wages or provisions, except in general average: *Padelford v. Boardman*, 4 Mass. 548. And we think it to be very clear, that the parties did not intend to blend the particular and the general average, and to allow any item of the latter to be added to the former. They meant, no doubt, very accurately to define, if not to narrow, the right of the insured to abandon for damage as a technical total loss; a right founded on an arbitrary rule, which we think an entire departure from the great principle of indemnity upon which the contract of insurance should rest.

The court are of opinion, that the plaintiffs have no reason to complain of the instruction upon this point.

The plaintiffs contended, that if the voyage was broken up by the injury to the vessel, it was a good cause of abandonment. If that should be admitted, there were two answers: 1. That there was no evidence that the voyage was destroyed; and, 2. That there was no abandonment made in season. As to the first, the cargo consisted of wines and other articles which were not perishable; and the ship was repaired in about ten days, so well as to make a voyage across the Atlantic.

The report finds, that during the trial, it was agreed by the parties that the jury might find for a total or a partial loss generally, and that the court should appoint assessors; and it

was suggested by the plaintiffs' counsel, after the jury had retired, that the jury had not been informed of the fact last stated, and that, if they were instructed upon that point, it might save them the labor of assessing the damages. This seeming to be very reasonable and expedient, I then proposed to give them the additional instructions mentioned in the report, and read the same in open court to the counsel of the parties, who were present; and to part of those instructions, the counsel for the plaintiffs objected then and now. The jury were desired to find the items of damage which, in their opinion, exceeded one half of the amount insured, if such should be their opinion. And we do not think there was anything wrong or irregular in that instruction. In civil proceedings, the law and the fact should be kept as distinct as possible, to the end that the law may be practically what it professes to be, a uniform rule of action. Such inquiries are very frequently made; and the answers of the jury often prevent the necessity of further expense and litigation. The verdict disposed of the question of due diligence, which the court thought should have been used to ascertain the fact, whether, or not, funds could have been obtained.

The only other question remaining is, whether the juror who was returned by the sheriff as a talesman, could be considered as competent, inasmuch as the sheriff was one of the stockholders of the insurance company, the defendants. And without taking into consideration, whether any importance ought to have been given to that circumstance, we think that the knowledge which the junior counsel for the plaintiffs had of the fact, soon after the trial commenced (which knowledge was admitted), and, also, his proceeding with the trial for some time afterwards, without objection, should be considered as a waiver of the objection raised by the senior counsel to the competency of the juror.

Upon the whole matter we are all of opinion, that the judgment should be rendered for the plaintiffs, for a partial loss. The court will appoint an assessor to ascertain the damage, unless the parties shall agree upon one, in which case the court will adopt their nomination.

The principal case is a leading one in Massachusetts, and has been cited upon the following points in subsequent cases in that state: That loss on the sale of the outfit of a schooner, sold by the master to raise money, should be allowed in the general average: *Giles v. Eagle Ins. Co.*, 2 Metc. 144. That in estimating the expenses to determine whether the assured has the right to abandon and demand a total loss, a general average is not to be added to the cost of repairs: *Greeley v. Tremont Ins. Co.*, 9 Cush. 421. That in deter-

determining whether the expense of repairing an injury sustained by a vessel insured under a valued policy will exceed half of her value, and thus constitute a technical total loss, the valuation of the vessel in the policy is conclusive: *Allen v. Com. Ins. Co.*, 1 Gray, 157. See *Deblois v. Ocean Ins. Co.*, 23 Am. Dec. 245. That a general average loss is not to be added to a partial loss to make up a constructive total loss: *Ellcott v. Alliance Ins. Co.*, 14 Gray, 318. That all legal expenses may be included in estimating the amount of the loss to be recovered under a policy of insurance: *Blanchard v. Equitable Ins. Co.*, 12 Allen, 390, and *Paddock v. Com. Ins. Co.*, 104 Mass. 535. Also cited in *Hall v. Ocean Ins. Co.*, 21 Pick. 483; *Kent v. Charlestown*, 2 Gray, 281; and *Heebner v. Eagle Ins. Co.*, 10 Id. 143.

In *Deblois v. Ocean Ins. Co.*, 16 Pick. 303; S. C., 23 Am. Dec. 245, it was held that where a vessel insured under a valued policy is injured by the perils insured against, the loss is not total unless the expense of repairs exceeds fifty per cent. of the valuation in the policy after the deduction of one third new for old.

ABANDONMENT.—This subject is considered in the note to *Deblois v. Ocean Ins. Co.*, 23 Am. Dec. 252.

PRESIDENT ETC. OF COMMERCIAL BANK v. FRENCH.

[21 PICKERING, 486.]

RELEASE OF SURETY ON NOTE.—Where a joint and several note, made by T. as principal and the defendant as surety, payable to a bank, on demand, as collateral security for a check given by the principal for a loan of money, remained in the bank six months before it was entered on the bank's books, the loan being intended to be temporary, and the surety was not called on for payment, nor was notice given to him of the non-payment of the note until the further lapse of six months, when the principal had become insolvent, these circumstances were held not to release the surety in an action upon the note.

ACTION UPON A NOTE PAYABLE "to the cashier of the Commercial bank," may be maintained by the bank as promisee, it appearing that the consideration proceeded from the bank.

ASSUMPSIT upon the following note:

"Boston, September 28, 1835. For value received I, John Thompson, as principal, and I, John French, as surety, jointly and severally promise to pay the cashier of the Commercial bank, Boston, or his order, nine thousand dollars, on demand with interest.

JOHN THOMPSON.

JOHN FRENCH."

From the evidence it appeared that at the time the note was given Thompson was indebted to the bank, and that he applied for a further loan. That it was agreed that he should have nine thousand dollars upon his check, and French's name as collateral security. That he brought the note and gave his check for the amount and received the money. The loan was regarded as a

temporary one; the note was not discounted, and was not entered upon the bank books as a note discounted; the only reference to it being in the discount book made in March, 1836, long after the money was lent. Thompson was often applied to to pay the loan, but French never was, nor was anything said to him about it until Thompson's failure in October, 1836. The note was not indorsed. The objection of the plaintiff to the form of the action is stated in the opinion. Verdict for the plaintiffs subject to the opinion of the court.

H. H. Fuller, for the defendant.

Sprague and E. Blake, *contra*.

By Court, MORRIS, J. The plaintiffs are the *bona fide* holders of the note, for a valuable consideration. The circumstance that they originally received it as collateral security, can have no effect upon the validity of the contract or the liability of the parties.

Nor can the character in which the defendant became a party to the note avail him. It is payable on demand, and draws interest from its date. It could not therefore have been the expectation of the parties, that it was to be discounted, or that payment would be immediately demanded. There is no evidence that the defendant has suffered by the delay. It can not properly be called a prolongation of credit, as no time of payment was fixed. Nothing is better settled, than that the voluntary forbearance to collect, or the mere delay to prosecute upon any kind of security, will not discharge a surety. To produce that effect there must be either a valid agreement not to enforce payment, a denial of a reasonable request, on the part of the surety to collect, or some fraud or negligence of the obligee or promisee, injurious to the surety: *Hunt v. Bridgham*, 2 Pick. 581 [13 Am. Dec. 458]; *Baker v. Briggs*, 8 Id. 123 [20 Am. Dec. 311]; *Ludlow v. Simond*, 2 Cai. Cas. 30 [2 Am. Dec. 291]; *Pain v. Packard*, 13 Johns. 174 [7 Am. Dec. 369]; *Powell v. Waters*, 17 Id. 176; *King v. Baldwin*, 2 Johns. Ch. 557; *Hayes v. Ward*, 4 Id. 129 [8 Am. Dec. 554].

But the only objection much relied upon or worthy of much consideration, relates to the form of the action. The note is in terms payable to "the cashier of the Commercial bank;" and the defendant contends that the action should have been brought in the name of the person who was then cashier and will not lie in the name of the corporation. It is not denied that the property of the note is and ever has been in the plaintiffs; but the argu-

ment is, that the promise being in the name of the cashier, although made to him in trust and for the benefit of the corporation, it can only be enforced in his name.

It is a familiar rule of pleading, that contracts must be declared on according to their legal import and effect, rather than their literal form: 1 Chit. Pl., 1st ed., 299, 302. We should therefore first seek the true import of the contract under consideration. If it be in truth a promise to the individual who was cashier when it was made, and not to the corporation, it is very clear that the plaintiffs can not maintain this action. For he alone to whom a promise is made, or in whom its legal interest is vested, can enforce its performance or complain of its breach: Ham. on Parties, 4; 1 Chit. Pl., 1st ed., 3-5 and cases there cited; *Allen v. Ayres et al.*, 3 Pick. 298. A contract may be made to or with a person, as well by description as by name. And where the parties can be ascertained, it will be valid, although their names be mistaken or their description be incorrect. It can not be doubted that a note to the Commercial bank would be valid and might be declared on as a promise to the plaintiffs, although their legal name is, "the president, directors, and company of the Commercial bank." So a contract with the stockholders, or with the president and directors, or with the directors of the Commercial bank, would doubtless be, in its legal effects, a contract with the corporation. It is not easy to perceive why a contract with a cashier of a bank is not a contract with the bank itself. The accounts of banks with each other are usually kept in form with the cashiers, but undoubtedly the banks themselves are the real parties to them: *The Master etc. of Sussex Sidney College v. Davenport*, 1 Wils. 184.

A corporation being an incorporeal being and having no existence but in law, can neither make nor accept contracts, receive nor pay out money, but by the agency of its officers. They are the hands of the corporation by which they execute their contracts, and receive and make payments. Of these officers the cashier is the principal. If the note had been made to the corporation, by its appropriate name, the same officer would have demanded and received payment, or would have given notice of non-payment and protested it, and, had it been negotiated, would have made the indorsement, and in precisely the same form as he would upon this note.

There are several decisions in our own reports, which support this view of the subject, in cases less strong than the present. In the *Medway Cotton Manufactory v. Adams et al.*, 10 Mass. 360,

it was decided, that a note payable to Richardson, Metcalf & Co. might well be declared on as a promise to the Medway cotton manufactory. In the *Taunton and South Boston Turnpike v. Whiting*, Id. 327 [6 Am. Dec. 124], it was holden, that the promise, in a subscription paper, to pay the assessments which should be made on certain shares, to John Gilmore or order, would support an action in the name of the corporation. And in *Gilmore v. Pope*, 5 Id. 491, it was directly decided, that an action would not lie upon the same subscription in the name of Gilmore, but must be brought by the corporation: *Piggott v. Thompson*, 3 Bos. & Pul. 147.

The principle is that the promise must be understood according to the intention of the parties. If in truth it be an undertaking to the corporation, whether a right or a wrong name, whether the name of the corporation or of some of its officers be used, it should be declared on and treated as a promise to the corporation. And there is no so safe criterion as the consideration. If this proceed from the corporation, it raises a very strong presumption that the promise is made to them. If no express promise be made, but it be left to legal implication, it must be to them. Some later cases have the appearance of clashing a little with the two last above cited. But probably they may be reconciled by a reference to the different nature of the promises declared on, and the different state of the facts. In *Fisher v. Ellis*, 3 Pick. 322, it was decided that a note payable to the treasurer of a parish, though given for the funds of the parish, might well be sued in the name of the treasurer. And in *Fairfield v. Adams*, 16 Pick. 381, it was holden that a note indorsed to S. S. Fairfield, cashier, would sustain an action in the name of Fairfield. See, also, *Little v. O'Brien*, 9 Mass. 423; *Brigham v. Marean*, 7 Pick. 40. Great favor and indulgence are always shown to negotiable securities. The above cases seem to show, that upon such paper, when made in the name of an agent or officer, though the beneficial interest be in the corporation, they may be sued by him. But they do not show that an action might not also be maintained in the name of the corporation. The contrary is plainly intimated in *Fisher v. Ellis*. It has been the practice to sue towns on notes given by their treasurers. Many such actions have been brought and maintained: See *Precedents of Declarations*, 111. If a note given by the treasurer of a corporation, is the contract of the corporation, we can see no sound reason why a note given to the treasurer should not be an available promise to the corporation.

There is an obvious and broad distinction between the case at bar and those of *Fisher v. Ellis* and *Fairfield v. Adams*. Had the note been made to the cashier, by name, the addition of "cashier of the Commercial bank," might have been considered as *descriptio personæ* used to designate as between him and the bank the relation he bore to it in the transaction, and the individual might have been deemed the promisee as in those cases. But such was not the fact, and we discover no valid objection to the plaintiffs' recovery.

Judgment on the verdict.

The rule adopted in the principal case, that a promise is to be declared upon according to its legal import and effect, and that a bank corporation may maintain an action upon a note payable to its cashier, it appearing that it was given for its benefit, and that the promise was actually made to it, is approved in *Association v. Baldwin*, 1 Metc. 365; *Lowell v. Morae*, Id. 475; *Bryant v. Eastman*, 7 Cush. 114; *Barlow v. Congregational Society*, 8 Allen, 462; *Eastern R. Co. v. Benedict*, 5 Gray, 563; *Commercial Bank v. French*, 13 Id. 67, all citing principal case. Also cited in *Melledge v. Boston Iron Co.*, 5 Cush. 176, and *Gifford v. Rockett*, 121 Mass. 432, to the effect that the misnomer of a corporation in a writing does not prevent a recovery thereon by or against the corporation in its true name.

COMMONWEALTH v. CALL.

[21 PICKERING, 509.]

ADULTERY AS USED IN THE STATUTES of Massachusetts, includes the act of a married man having sexual intercourse with an unmarried woman.

SPECIAL VERDICT FINDING A DEFENDANT GUILTY of the offense charged in the indictment, but not finding him guilty in the county where the offense is alleged to have been committed, is insufficient.

SUCH A VERDICT DOES NOT AMOUNT TO AN ACQUITTAL, but the accused is entitled to a new trial.

DEFENDANT was tried in the municipal court upon an indictment for adultery committed in the county of Suffolk, and the jury returned a special verdict, finding the defendant guilty of having sexual intercourse with Eliza Foster, the person named in the indictment, she at the same time being an unmarried woman, and the defendant being a married man and having a lawful wife at the time, then living. The defendant moved in arrest of judgment, because the facts set forth in the special verdict did not constitute the crime of adultery. The motion was overruled, and judgment entered on the verdict.

Gleason, for the defendant.

Austin, attorney-general, contra.

By Court, DEWEY, J. The counsel for the prisoner contends, that upon the special matter found by the jury on the trial of this cause, it was not competent for the municipal court to enter a judgment, that the jury had found the prisoner guilty of the crime of adultery in the manner and form alleged in the indictment. The matter thus found is alleged to be insufficient for two reasons:

1. That the facts of which the jury have found the prisoner guilty, do not constitute the crime of adultery.

2. That it does not appear that the offense was committed within the county of Suffolk.

The statute of this commonwealth making adultery an offense punishable in the common law courts, has not given a definition of this crime. Such is generally the case in our criminal code, as to the higher crimes. They are not defined in our statute book, but are assumed to be well known as offenses at common law, and under the general term denoting the offense, it is declared by law to be a crime, and the mode of trial and measure of punishment are alone prescribed by statute. If questions arise in such cases as to what constitutes the offense, recurrence is to be had to well-established definitions sanctioned by books of authority and adopted by long usage, and with reference to which it may be supposed the legislature have acted in the enactment of the law punishing the offense.

It so happens, that on the present question we derive less aid than usual from the lights of the common law, the crime of adultery not being cognizable by the temporal courts in England as a public offense, but only as a private injury; and hence we have not that distinct character of this crime, well defined and made familiar to us by the books of common law, that would be found to exist in relation to other offenses. By the civil law, adultery could only be committed by the unlawful sexual intercourse of a man with a married woman. Thus, as is stated in Wood's Institute, 272, adultery is a carnal knowledge of another man's wife, and the connection of a married man with a single woman does not make him guilty of the crime of adultery. On the other hand, in the English ecclesiastical courts it is held that the offense of adultery is established by showing that the husband has had illicit intercourse with any person, and no distinction is taken whether the alleged offense was committed with a married or unmarried female.

Such is the general rule in cases of divorce granted for the cause of adultery, not only in England, but also, as I suppose,

throughout the United States. Our ancient colonial statute (of 1646) punished with death the "crime of adultery with a married woman or espoused wife." The offense punishable by this law clearly would not have embraced the present case. Under the provincial statutes the punishment was much mitigated, and the offense described under the general term adultery, without the additional description of the offense being committed with a married woman. The earliest statute on the subject after the adoption of the constitution, stat. 1784, c. 40, contains, as was usual at that period, a preamble setting forth the objects of the statute, among which is stated that of enforcing "the due observance of the marriage covenants," thus indicating its general application to both the parties, rather than the more limited object of punishing the infidelity of the wife merely. This statute also punished the offense under the general term of adultery.

The statute of 1785, c. 69, authorized a divorce from the bonds of matrimony for adultery in either of the parties; and it is to be observed, that the same descriptive term is here used as in the statute making the offense a crime punishable in the courts of law, and the words are in no degree more extensive. The question naturally arises, whether it may not be fairly inferred that the legislature, using the same term, in two successive political years, as descriptive of an offense, did not intend that the same offense should be indicated by it in both cases. But as to the construction of the term adultery in the statute last cited, it has always been held to include the case of any unlawful intercourse by a married man.

Much light is also thrown upon the present question by the revised statutes, c. 130, sec. 1, which is the existing law on the subject, and wherein it is provided, in addition to the former statute punishing the crime of adultery, that "when the crime is committed between a married woman and a man who is unmarried, the man shall be deemed guilty of adultery." This addition to the former statute provisions would be entirely unnecessary, if the definition of adultery were such as is alleged by the counsel for the prisoner. If the civil law definition of this crime had been adopted here, the unmarried man might for such an offense well be holden guilty of the crime of adultery, without this additional statute provision.

But it is well understood to have been the law of this commonwealth prior to the revised statutes, that if the party was not a married man, the offense of having unlawful intercourse with a married woman would not be adultery in him: 6 Dane

Abr. 676. We think it will be found that the same construction has been given to the statute of 1784, c. 40, as to that of 1785, c. 69, authorizing divorces for adultery, and that it has been uniformly holden that the same offense which would subject the party to a divorce, would also sustain an indictment for the crime of adultery. Such certainly has been the rule practiced upon in our criminal courts for many years, and although several convictions in such cases are remembered, no exceptions have been taken, bringing the question before this court for revision.

The late Solicitor-general Davis, who was a very good criminal lawyer, and had the benefit of thirty years' experience in the office of public prosecutor, so understood the construction given by the court to the statute punishing this offense, as is apparent from the precedents published by him at the close of his official duties, wherein are found forms of indictments for adultery, distinctly adapted to the case where the offense is committed by a married man with a single woman: Davis' Precedents, 48.

Whatever, therefore, may have been the original meaning of the term adultery, it is very obvious that we have in this commonwealth adopted the definition given to it by the ecclesiastical courts, and this not merely in relation to divorces, but also as descriptive of a public crime. We hold the infidelity of the husband as well as that of the wife, the highly aggravated offense, constituting the crime of adultery. Familiar as the legislature must be supposed to have been with this construction of the statute of 1784, c. 40, they sanctioned in the revised statutes the same form of expression, without any restriction of the extended application given to it by the courts of law, and making no other alteration except that already referred to, enlarging its application so as to include within it the case of the unmarried man who should commit the offense with a married woman. The court are satisfied that by the proper construction of the term adultery as used in our statutes, the offense is committed by a married man who shall have sexual intercourse with an unmarried woman. Applying this rule of law to the facts specially found by the jury, they establish the crime of adultery to have been committed by the prisoner.

This brings us to the second objection taken to the sufficiency of this verdict, which is, that the jury have not found that the offense charged upon the prisoner was committed within the county of Suffolk.

It is a very familiar principle in the administration of the criminal law, that all the circumstances essential to sustaining the in-

dictment must be expressly found by the jury, and the court can not supply a defect in the finding of the jury by intendment or implication: 1 Chit. Crim. L., 644; Bac. Abr., Verdict, D. It is equally clear, that it must always appear that the jury have found the offense was committed within the county in which the indictment is found, or the court can not give judgment against the prisoner: 1 Stark. Crim. Pl. 354; *The King v. Hazel*, 1 Leach, 406. In the ordinary case of a general verdict of guilty, the jury, by the very terms of their verdict, find the prisoner guilty of all the material allegations in the indictment. Not so in a special verdict, for the very object of this departure from the usual form, is presumed to be for the purpose of declaring the prisoner guilty of certain facts only, with a view of submitting the question, whether those facts authorize a general verdict of guilty, to the judgment of the court. In such a case, if the facts thus found do not include all the essential elements of the offense charged upon the prisoner, he can not be convicted.

The finding of the jury in the present case shows the defendant guilty of acts constituting the crime of adultery, but is entirely defective as to the fact where the crime was committed. The facts found by the jury may all be truly found, and yet they may have occurred in an adjacent county, or out of the commonwealth. We can not judicially know that the offense was committed in the county of Suffolk, the jury not having so said, either directly, or by any reference to the indictment in their verdict. The court are therefore of opinion that it was not competent for the municipal court to render a judgment upon this verdict; that the jury had found the prisoner guilty of the offense as charged in the indictment, and to this extent the exception taken to the ruling of the judge must be sustained.

The only remaining inquiry is, whether this defect in the finding of the jury entitles the prisoner to a judgment as upon a verdict of not guilty.

The finding of the jury here was altogether an imperfect and defective finding, and therefore not available either to the government as a verdict of guilty, or to the prisoner as a verdict of acquittal. It neither affirms nor denies as to the truth of any allegations in the indictment, other than as to the facts specially stated in the verdict. Had it found the prisoner not guilty except as to the matter thus specially stated, it would have been effectual to discharge the prisoner and would be tantamount to a verdict of acquittal; but in its present form it can not operate

as such, and the result will be, that the prisoner must be put again on his trial: 1 Chit. Crim. L. 646; *Rex v. Woodfall*, 5 Burr. 2661; *Rex v. Hayes*, 2 Ld. Raym. 1522.

The bill of exceptions is sustained, and the case remanded to the municipal court for a new trial.

Cited in *Dyer v. Commonwealth*, 23 Pick. 403; *Commonwealth v. Fischblatt*, 4 Metc. 355; and *Commonwealth v. Dooly*, 6 Gray, 360, to the point that a special verdict, to be sufficient to sustain a conviction, must state all the facts which constitute the offense charged, and that nothing can be taken by the court by implication or intendment. Also cited in *Commonwealth v. Bradley*, 2 Cush. 553, that adultery may be committed by a married man with a single woman.

ADULTERY.—By the common law of England the crime of adultery was not punishable in the temporal courts as a public offense, but only as a private injury: 4 Bl. Com. 65. Hence to be able to state in what this offense consists, it becomes necessary to resort to other lights than those of the common law. Adultery was, however, punished in that country by the ecclesiastical courts, and in most of the United States, in which the common law of England prevails, the ecclesiastical law is considered, at least as far as the definition of the offense is concerned, to be in force: 2 Whart. Crim. L., 8th ed., sec. 1717. The component parts of the ecclesiastical law are the Roman and canon law. By the former this offense was confined to illicit sexual intercourse with a married woman. A married man who had illicit intercourse with an unmarried woman was not guilty of adultery. The reasons given for this limitation, are: 1. The exclusive rights of the husband, as head of the family, were thus asserted; and, 2. The line of descent from the father to the child was thus protected: *Id.*, sec. 1718. By this law the offense of adultery was severely punished, it being regarded as a species of high treason, inasmuch as it invaded one of the fundamental principles of such law, the absolute supremacy of the husband and father in his own home. By the canon law, this offense was committed by a sexual violation of the marriage vow, whether the offender was male or female, and consisted in the sexual connection between man and woman, one of whom was lawfully married to a third person: *Id.*, sec. 1719. This definition of the offense is stated by Mr. Wharton to have superseded that of the Roman law, and to have been "accepted by every Christian state, at the time of the colonization of America; and is no doubt part of the common law brought with them by the colonists of all Christian nationalities:" *Id.* In some of the United States this offense is defined by statutory enactments, and in some courts, it is held that the offense was cognizable at common law by the criminal courts: *State v. Wallace*, 9 N. H. 15; *State v. Avery*, 7 Conn. 267. While in others it is held that such courts have no jurisdiction to punish the same: *State v. Cooper*, 16 Vt. 551; *Anderson v. Commonwealth*, 5 Rand. 628; 16 Am. Dec. 776; *Commonwealth v. Isaacs*, *Id.* 634. "In those states, however, which hold the offense is not cognizable by the common law courts, the subject has generally been defined by legislation. And as in many cases this legislation consists simply in making 'adultery' penal, the question has constantly arisen, what is adultery? Unfortunately, in seeking for the international common law on this point, the courts have gone back sometimes to the old Roman law, sometimes to the Jewish, both of which were superseded by the canon law, which, as we have seen, at the time of the colonization of America, was in this respect the common law of

Christendom. But whatever may have been the sources of authority, we find in the United States the following definitions propounded: 1. That which has just been stated, that adultery consists in the sexual connection between a man and a woman, of whom one is lawfully married to a third person. In such case both participants are guilty of adultery: *Weatherby v. State*, 43 Me. 258; *State v. Hinton*, 6 Ala. 864; *State v. Wilson*, 22 Iowa, 364. 2. That it consists in sexual connection by a married person with one who is not such married person's husband or wife: *Commonwealth v. Lafferty*, 6 Gratt. 672; *Cook v. State*, 11 Ga. 53; *Miner v. State*, 58 Ill. 59. 3. That it consists in sexual intercourse with a married woman by one not her husband, in which case both the married woman and her paramour are guilty; this being the view of the Roman law: *State v. Wallace*, 9 N. H. 515; *State v. Armstrong*, 4 Minn. 335; *State v. Pearce*, 2 Blackf. 318. The reason resorted to in this line of cases is that of the old Roman jurists, that the offense is in part the interference with the husband's and father's autocracy, and in part the pollution of the channel of descent:" 2 Whart. Crim. L., 8th ed., sec. 1720; see *State v. Lash*, post.

COMMONWEALTH, BY THE BANK COMMISSIONERS, v. FARMERS' AND MECHANICS' BANK.

[21 PICKERING, 542.]

BANK COMMISSIONERS.—Statute 1838, c. 14, which provides that bank commissioners shall be appointed by the governor, that they shall visit the banks and shall have free access to their vaults, books, and papers, and shall make all such inquiries as may be necessary to ascertain the condition of the banks, and their ability to fulfill their engagements, and whether they have complied with the provisions of law, and may summon and examine under oath, the officers and agents of the banks, in relation to the transactions, and condition of the bank, and that an officer or agent who shall refuse "without justifiable cause," to appear and testify when thereto required, shall be subject to fine and imprisonment; and if upon an examination of any bank they shall be of opinion that it is insolvent, or that its condition is such as to render its further progress hazardous to the public, and that it has exceeded its powers or has failed to comply with all the rules, restrictions, and conditions provided by law, they may apply to a justice of the supreme judicial court, to issue an injunction to restrain such corporation, in whole or in part, from further proceeding with its business, until a hearing of the corporation can be had, and the justice shall forthwith issue such process, and after a full hearing of the corporation upon the matters aforesaid, may dissolve or modify the injunction or make it perpetual, and, at his discretion, appoint a receiver, is not unconstitutional.

SUCH STATUTE IS NOT UNCONSTITUTIONAL because it usurps judicial power in requiring the justice, in the first instance, on the complaint of the bank commissioners, without the hearing of evidence to satisfy his mind, to issue an injunction; because it in effect declares that the representations of such commissioners made upon such examination, and of such facts, shall be *prima facie* evidence that the bank is acting unlawfully, and its further operations will be dangerous to the community.

SUCH REPRESENTATIONS MADE BY SUCH OFFICERS in the manner provided by such statute, are entitled to fully as much credit as an affidavit would be, for the purpose of obtaining an attachment on mesne process or a *destringas*, or a sequestration.

SUCH JUSTICE IN THE ISSUANCE of the preliminary injunction required by such statute, exercises judicial powers in determining that the complainants are the bank commissioners; that they have examined the bank complained against in the manner required; that it is insolvent, or that its further proceeding is dangerous to the public; and that the application is made in the form required.

A JUDICIAL DISCRETION IS ALSO EXERCISED by the justice in determining upon the complaint of the commissioners, to what extent the preliminary injunction shall go; whether to entirely or only partly suspend the operations of the bank.

SUCH STATUTE IS NOT OPEN to the objection that it compels the officers and agents of a bank to furnish evidence which may criminate themselves, because it only allows a penalty to be imposed upon those who, "without justifiable cause," shall refuse to appear and testify; and if they should refuse to testify because their evidence would criminate themselves, that would be a justifiable cause, and consequently no penalty could be imposed.

THE OBLIGATION OF ANY CONTRACT is not impaired by such statute because it suspends the proceedings of a bank by an injunction, and thereby diminishes the period for which the bank is by its charter empowered to act as a coporation; because if a bank violates its charter or the law, there must be some mode prescribed by judicial inquiry into the fact, and for giving redress to parties who have suffered thereby; and an injunction is not an arbitrary suspension of the corporate powers of the bank, but a species of compulsory process, analogous to the constant course of action in similar cases, designed to take the subject of controversy into the custody of the law, during the inquiry, to prevent further progress in a course thus shown to be mischievous and dangerous, and to secure the means of affording redress to the sufferers, in case the charges are found true.

SUCH INJUNCTION IS NOT THE ADJUDICATION OF A FORFEITURE, nor is it an entire suspension of the corporate functions of the bank, but only an inconsiderable interruption, and therefore is not in any just sense a diminution of the time for which the charter of the bank was granted.

BILL in equity by Waldo Flint, Julius Rockwell, and Jonathan Shove, as bank commissioners. It alleged that upon an examination of the Farmers' and Mechanics' bank in Adams South Village, they are all of the opinion that the condition of the bank is such as to render its further progress hazardous to the public, and that it has exceeded its powers, and has failed to comply with all the rules, restrictions, and conditions provided by law in the following particulars, to wit: That it went into operation before one half, at least, of its capital stock had been paid in gold and silver money, etc.; that the whole of the capi-

tal stock was not paid within the time limited therefor in the act of incorporation, and the additional act of 1837, c. 108; that loans were made to certain supposed stockholders, before the full amount of their respective shares had been paid; and that a large amount of the capital stock was sold and transferred before the whole amount thereof had been paid in; wherefore the commissioners prayed that the bank be enjoined to proceed no further in the business for which its act of incorporation was granted, and that a receiver may be appointed to take possession of all the property of the corporation, and to apply the same in discharge of the liabilities of the corporation. The bill was filed in the clerk's office of the supreme judicial court in October, 1838, and upon application to one of the justices a limited injunction was granted until the further order of the court or one of the justices, and a time was fixed for hearing the defendants at a period of fourteen days from the time of granting the injunction. The answer of the defendants alleged that the bank was incorporated under the statutes of 1836, c. 124, on the first of April, 1836, and that the act under which the plaintiffs claimed their authority was passed in 1839: Stat. 1839, c. 14. That the latter act had never been adopted, accepted, or assented to by the defendants, and that it was not intended to apply to charters and banks granted and created before its passage. It was also claimed that the act was void for certain reasons which are stated in the opinion; and there was also a denial that the bank had exceeded its powers.

Choate, for the defendants, moved that the injunction be dissolved because the legislature had no authority to pass the stat. 1838, c. 14.

C. P. Curtis and B. R. Curtis, contra.

By Court, SHAW, C. J. This is a very important case, and it has demanded and received the early attention of the court. The case involves the construction of the stat. 1838, c. 14, providing for the appointment of bank commissioners, prescribing their duties, and making various provisions for proceedings, in relation to banks which have failed to comply with the provisions of their respective charters, or which are supposed to be insolvent, and whose further proceedings may be deemed dangerous to the public.

Before considering the defendants' answer to the bill, a preliminary question arose of so much importance, that it was thought advisable to bring the matter before the full court as

early as the convenience of the court would admit, and with that view, precedence was given it, and it was taken up on the first day of the present term. The defendants contend, that, without regard to the merits of the bill or the facts stated in the answer, they have a right to have this injunction immediately dissolved; that the law under which it issued, is unconstitutional or beyond the just limits of legislative power; that in this respect it is inoperative and void; that the injunction, though required by the statute, was improvidently issued and without warrant of law, and therefore ought now to be dissolved. If the law is justly open to the objections mentioned, it can hardly be denied that the consequences suggested must follow. But such a legislative act is not to be declared inoperative and void, as not being within the limits of legislative authority, unless it is clearly shown to be so.

The first objection is, that this act is an interference of the legislature, and an assumption of judicial power, because it makes it the duty of the judge, in a particular case, to perform a judicial act, that of issuing an injunction. But we are of opinion, that the act is not justly open to objection in this respect. It does not direct that an injunction shall be issued against a bank in Adams; it provides prospectively by a general law, in regard to all banks, constituting a large class of corporations, that in a given state of facts, an injunction shall issue, to continue until a hearing can be had.

But it is regarded as a restraint upon the judicial power, by requiring an injunction to be issued by a judge, without exercising a judicial power in deciding upon the sufficiency of the proofs offered. In order to decide upon the force of this objection, it is necessary to consider:

1. The objects which the legislature had in view in the adoption of these measures;
2. The means which they have adopted for accomplishing those objects; and,
3. Whether in the ends proposed, or in the means prescribed, the legislature have transcended the powers vested in them by the constitution, or exceeded the just limits of legislative authority.

The manifest object which the legislature had in view, was to provide as far as practicable for the prevention and redress of the evils and mischiefs both to the public and to individuals, proceeding from the violations of their charters by banks, and from their insolvency. The object was to prevent their becom-

ing dangerous to the public by their mismanagement and breach of the laws; and to provide relief for their creditors, as far as possible, when they have become insolvent. When it is considered how important it is to all the great interests of the community, that banks should be managed uprightly and with integrity, and according to the rules of law prescribed for their regulation, in their charters and by general laws, and how important it is that they should enjoy the confidence of the community, there seems to be no doubt that the objects proposed are proper subjects for the exercise of legislative power.

In case, therefore, either of violation of charter, or of insolvency, it is a legitimate exercise of legislative power, to provide, first, for a proper and effectual mode of ascertaining the facts, by a judicial investigation, upon which the supposed delinquency depends; and secondly, for securing the assets of the delinquent institution to as large an extent as possible, in order to provide for a payment in full amongst all the creditors, or if not sufficient for that purpose, then for an equal distribution; and if there is a surplus, then for an equal distribution amongst the stockholders and others interested.

2. Supposing these to be suitable and proper objects for the exercise of legislative power, the more material question is, whether the means provided by this statute are legitimate. Whenever either a forfeiture of charter or insolvency are to be inquired into, there must be some mode of judicial proceeding, some suit must be instituted. Such mode may be properly directed by law; subject only to the conditions, that it be fair and impartial, calculated to secure and preserve the rights of all parties to be affected by it. It is desirable that it should be as nearly conformable as conveniently may be, to the course of judicial proceedings in like case.

Such a suit may to a certain extent interfere with the liberty of action, and even with the right of property, of such institution; but this can not be considered as going beyond the limits which justice requires, and which the law in like cases allows, if it extend no further than to preserve the property until the inquiry can be had, and to secure it for a distribution amongst creditors, stockholders, and others entitled to it, in case such should be the final judgment upon such inquiry. It is like the case of an attachment on *mesne* process, or a *distringas*, or a sequestration, where the property is taken into the custody of the law at the commencement of the suit, to await the result, or like an arrest upon a *capias* or *ne exeat*, which deprives the party

in the first instance and before hearing, of his personal liberty, or compels him to give security for his appearance. It is justified on the ground that without it justice could not be done, and the effect of a judgment might be eluded. But if it is competent for the legislature to accomplish these objects, by any mode of judicial proceeding, it may as well be done in the form of a bill in equity as in any other. It seems to be a well-settled rule, that where the legislature have the power to provide redress for either a public or private wrong, the remedy or mode of redress is wholly a subject of legislative discretion. If an injunction is better adapted to accomplish the objects proposed, than any other form of judicial process, there seems no reason why the legislature should not have power to direct it. It has already been provided for in the case of waste, where it may issue at once; so to prevent a nuisance, where the mischief to be done would be irreparable.

But the main objection is, that this is a usurpation of judicial power, because it requires the judge, in the first instance, on the complaint of the bank commissioners, without a hearing of evidence to satisfy his own mind, to issue an injunction.

But it appears to us that this is not a just view of this act. The act first provides for the appointment of commissioners, who are to be sworn to the faithful performance of their duty. It provides ample means for enabling them to conduct their inquiries into the condition of banks. It then provides, that if upon examination of any bank, a majority of the commissioners shall be of opinion that the same is insolvent, or, that its condition is such as to render its further progress hazardous to the public, or to those having funds in its custody, and also, that it has exceeded its powers or has failed to comply with all of the rules, restrictions, and conditions provided by law, they may apply to a justice of this court, to issue an injunction to restrain the corporation, in whole or in part, from further proceeding with its business, until a hearing of the corporation can be had, and the justice shall forthwith issue such process, and after a full hearing of the corporation, may dissolve or modify the injunction, or make the same perpetual, etc. The law in effect declares, that a complaint or representation, made by such officer, upon such examination, and of such facts, shall be deemed *prima facie* evidence that the bank is acting unlawfully; that its further operations are dangerous to the community, and that a case has occurred in which it is proper and necessary, first, to issue process to call on the bank to answer to the complaint;

and secondly, to secure their property in the mean time from being secreted, or withdrawn and appropriated to favored creditors, instead of being equally distributed. If it provided that upon similar facts being shown by affidavit, like process should issue, as attachment, *distringas*, or sequestration, it would hardly be considered obnoxious to the objection now made. Indeed an injunction is often issued in other cases, upon affidavit before hearing or notice. But such a complaint, from responsible officers, is fully as much entitled to credit as an affidavit. It is in some measure like an inquisition, somewhat like an indictment, but perhaps still more like an information, all of which are known forms of proceeding to put a party on trial.

Again, here is room for the exercise of judicial powers. The judge is judicially to inquire and ascertain, that the complainants are such bank commissioners; that they have examined the bank complained against, in the manner required by the statute; that they have come to the opinion, that the bank is insolvent, and that its condition is such, that its further proceeding is dangerous to the public, and that it has violated its charter, and also, that they have made application in such form and manner as the law requires. There is also room for the exercise of judicial discretion, in determining upon the complaint, to what extent such injunction shall go, whether to prevent their issuing bills only, or to prevent their paying bills, or deposits, or other debts; in short, whether it shall be a total suspension of all their operations, or a slight interference with them. The injunction is to be adapted to the case, and to meet the mischief, whatever it may be, suggested by the complaint. Also in fixing a time, at which the hearing shall be had and to which the injunction shall be continued. We are satisfied that by the term "hearing" in this part of the statute, is to be understood a summary hearing, before a single judge, and upon such hearing he may dissolve, continue, or modify the injunction, in such manner as the proofs offered upon such hearing, may in his judgment require. This fixing a time for hearing and for continuing the injunction is an important proceeding, requiring the exercise of a sound judgment applied to a complicated state of facts. In cases where the banks most abound, in the metropolis, and where a judge may usually be found, it would be practicable to have a hearing almost instant; in other cases, a longer time would be necessary.

3. It was objected that this act is unconstitutional in this, that it authorizes a mode of investigation by the commissioners, by

which bank directors and other officers may be called upon to make answers to inquiries which may criminate themselves, and render them liable to penalties. But we think that the answer given at the bar is decisive. When a legislative act has passed with all the formalities, required by the constitution to give it the force of law, it is to be presumed to be the exercise of a constitutional authority, unless the contrary plainly appears. And, further, if it does appear, that in some particular it conflicts with a provision of the constitution, which is the supreme law, that part of it only will be declared by the judicial department to be invalid and void, which is thus found to be contrary to the constitution, and in all other respects, the act will be considered good and in force.

The specific objection is, that by the constitution, no person is bound to furnish evidence, which may render him liable to a criminal prosecution; but by the act, all directors and other officers, are liable to be put to interrogatories, which may thus oblige them to criminate themselves. To this there are several answers; first, taking the constitution to be as supposed, then it will be presumed that the provision was to be taken with the implied exception, that no one shall be obliged to criminate himself. Again, supposing it should be held that the legislature intended to confer a power on the commissioners to that extent, the statute would be void only in this particular; no such power would be conferred by the form of words, because the legislature could not confer it; and should the commissioners attempt the exercise of such a power, those only who suffer by it will have a right to complain, and they will have their remedy. In all other respects the act will be valid.

But there is another answer, perhaps equally decisive. The immunity given to all the citizens of the commonwealth, by which they are exempted from the obligation to criminate themselves, is a privilege which each individual may claim for himself, or may waive, as he pleases. The act authorizes the commissioners to examine under oath all directors, officers, and agents of banks. It may be presumed that in most cases, such officers and agents would prefer to waive their privilege and make a full disclosure of all the facts within their knowledge, rather than lie under the suspicion, which their declining to answer would imply; and in such case, there is no reason why the commissioners, and through them the public, should not avail themselves of information which such answers voluntarily given, would afford. But after all, the provision of the act seems

hardly liable to the objection made to it. It authorizes the commissioners to summon and examine under oath, directors, officers, agents, and other persons, and it imposes a penalty upon those who, without justifiable cause, shall refuse to appear and testify. If they should decline to testify in any particular instance for a justifiable cause, they would not be liable for the penalty. And to decline answering in a case, in which it is provided by the constitution, that they shall not be held to answer, would plainly be a justifiable cause.

The other ground of objection to the constitutionality of this act is, that it impairs the obligation of a contract.

It may be conceded for the purposes of this inquiry, that an act of incorporation is to be construed to be a contract between the government on the one side, and those who accept the act and become a corporation and their successors on the other side; and the corporate power granted can not be revoked or annulled by an after act of legislation, unless a power has been reserved for that purpose, or with the consent of the corporation. But in applying this rule practically, it is necessary to consider how far and to what subjects, this contract extends. It is clearly a stipulation on the part of the government, that the corporation shall be and continue a corporation, for an indefinite time, or for the term limited in the act, unless sooner forfeited for some cause recognized by existing laws as a cause of forfeiture; that their constitution, organization, and mode of action, as prescribed by their charter, shall not be annulled or changed by the legislature; that members shall not be added or removed; that modes of election, expulsion, or suspension of members, shall not be altered; and that whatever belongs to their organic constitution and action, as bodies politic, shall continue and be determined by the terms of the charter. In addition to which, the powers specially granted to them, are not to be withdrawn or diminished.

But such immunities and privileges do not exempt corporations from the operation of those laws made for the general regulation and government of the citizens. If a law is made fixing the rate of interest, and what shall be deemed usury, and its legal consequences, corporations as well as individuals must conform to it. So as to the manner in which demands shall be made, notices given, and liabilities of promisors, drawers, and indorsers, on bills and notes, determined. Respecting such cases, there would probably be no difference of opinion. The great difficulty is, in a complicated case, to discriminate between

regulations, which affect corporations, as such corporations, and those which are of general application.

The first particular exception taken to this act, as diminishing the rights of corporations as such and thereby impairing the obligation of contracts, is, that it diminishes the time, for which, by charter, they were empowered to act as a corporation, viz. : all the time until 1851; that granting an injunction, before a hearing, which may diminish this term of unrestricted action, because the injunction may go to the entire suspension of their corporate functions, does diminish the time for which they were expressly authorized to act. But we think this objection is not well founded. The suspension is not an arbitrary diminution of the period of their organic existence as a corporation. They are incorporated on many conditions, some express, and some implied by law. The most obvious one is, that they will comply with the terms of their charter, one of which is, that they shall conduct their business according to banking principles and the rules of law. As they may violate the provisions of their charter and incur a suspension or forfeiture, there must be some mode prescribed for a judicial inquiry into the fact, whether they have so violated the terms of their charter, and for providing redress for those who may have suffered from such violation. The violation may be of such a nature, as more directly to affect the rights of individuals, who may have their remedies by suits at law or in equity, as the case requires; and they may obtain security for their violated rights, by attachment, sequestration, or such other process as the law furnishes, either before or after obtaining judgment. But the violation may be of such a nature as to affect the rights of great numbers, so that it may be considered as an injury to the community at large, in which case it is more consistent with public safety and convenience, and entirely consonant to the whole course of the administration of justice, to institute a process, in the name and under the authority of the government, bound as it is to provide security for its citizens.

When therefore the law provides for the commencement of such a process, upon such probable grounds as shall be deemed sufficient to justify a well-founded apprehension of misconduct, it is not an arbitrary suspension of the corporate powers of the bank, but a species of compulsory process, analogous to the constant course of action in similar cases, designed to take the subject of controversy into the custody of the law, during the inquiry, to prevent further progress in a course thus probably shown to be mischievous and dangerous, and to secure the means

of affording redress to the sufferers, in case the misdemeanors alleged shall be found to exist. The injunction contemplated is not the adjudication of a forfeiture, it is not an entire suspension of the corporate functions of the bank, and may be only an inconsiderable interruption, and therefore is not in any just sense a diminution of the time, for which the bank was granted.

The objection assumes only a slightly modified form, when it is urged that the bank has a right to hold its charter, until a judicial power acting judicially, takes away the chartered rights. This is true; but an injunction before hearing, is not a judgment of forfeiture, or in the nature of such a judgment. It might indeed have been as well termed a prohibition, a sequestration, or have had any other legal designation. It is as in the case of waste and nuisance, to prevent mischief, to keep the matter *in statu quo* until a hearing can be had, and to preserve as far as possible the means of affording redress by the judgment which may be afterwards given.

In examining a great question of corporate rights and immunities, and the extent of the legislative power, the question is, whether in any form the legislature can exercise the power, consistently with the provisions of the charter and the rights of the corporation, whether the power results from the general laws, or from particular reservations in the particular charter or class of charters to which it belongs. If the power exists, the mode of exercising it may be such as the legislature may direct. The remedy, therefore, for a violation of duty, may be altered and changed by legislative provisions, if the power of accomplishing the same objects by any means, is within the legitimate scope of legislative authority.

The court are of opinion, that this act, in the particulars stated, was not unconstitutional, that the statute under which the injunction issued, had the authority of law, that the injunction rightfully issued, and that the defendants, before answer or summary hearing and proofs offered, are not entitled to have it dissolved.

Cited in *Kimball v. Morris*, 2 Metc. 580. See *Wells, Fargo & Co. v. Coleman*, 53 Cal. 416, where it was held that incorporated commercial banks are liable to examination by the bank commissioners under an act of the legislature of the state of California, passed March 30, 1878, creating a board of bank commissioners, etc.

CASES
IN THE
HIGH COURT OF ERRORS AND APPEALS
OF
MISSISSIPPI.

MOORE v. VICK.

[2 HOWARD, 746.]

MISTAKE IN A DEED OR WRITTEN CONTRACT will not be relieved against unless express proof be adduced as to the intention of the parties.

CONVEYANCE OF A PARTICULAR TRACT without specification of quantity does not bind the vendor to a warranty of any particular number of acres, though there may have been an expectation in both parties to the sale founded on documents and other evidence known to both, that the tract contained a larger quantity than it actually does.

BILL in equity.

Coalter, for the plaintiff.

Bodley, *contra*.

By Court, PRAY, J. This is an appeal from the superior court of chancery. The appellant proceeded by bill against the appellee in the court below in which he alleges that the appellant's intestate, on the fifth of April, 1824, entered into an agreement with the appellee, as follows: "That the said Henry W. Vick, for, and in consideration of the sum of eight thousand two hundred dollars, to be paid as follows, to wit: two thousand two hundred dollars, on the first day of January next, and two thousand annually thereafter, until the whole is paid, hath bargained and sold unto the said Hughes, the whole of his stock, except six breeding sows, and the following described lands, to wit: certificate 879, for fractional section No. 10, T. 16, R. 4 E., in the district of land offered for sale at Washington, Mississippi, containing five hundred and seventy-two acres; also

the north-east quarter, No. 892, of section 17, T. 16, R. 4 E.; and the west half of the same section in the district aforesaid.

“ And the said Hughes, on his part, covenants and agrees to permit the milling and ginning of Willis Vick to be done gratis for the crop of the present year; and the said Henry W. Vick, on his part, covenants and agrees to finish the mill and gin, and to pay two thirds of all necessary repairs during the present year, and to collect and deliver the stock aforesaid, to the said Hughes; and upon the payment of the first mentioned sum of two thousand two hundred dollars, to deliver entire possession of the premises, and transfer the certificates aforesaid, to said Hughes; at which time said Hughes is to secure him in the payment of the other installments by deed, in trust upon the premises, and depositing said certificate in the hands of a trustee, with full power to sell and convey the same, upon failure to pay any one installment, at thirty days’ notice thereof. Witness, etc.”

He further alleges that the quarter and half section mentioned in said contract were supposed to contain, the former, one hundred and sixty, and the latter, three hundred and twenty acres, agreeably to the act of congress in such cases; making in the whole one thousand and fifty-two acres. He also alleges that certificate No. 892, for five hundred and seventy-two acres, only contains, according to a recent survey, four hundred and sixty-four and ninety-four one hundredths acres, that the half section mentioned in said contract, which ought, according to law and the supposition of the parties, to contain three hundred and twenty acres, does in fact contain two hundred and seventy-two and one fourth acres, and that the said quarter section, in the contract mentioned, which was supposed by the parties to contain one hundred and sixty acres, does in fact contain one hundred and seventy and sixteen one hundredths acres; and that, therefore, there is a deficit in the quantity of land supposed by the parties to be sold and purchased, of one hundred and forty-six acres.

In conclusion, he alleges, from information, that the stock specified in the said contract, was never delivered by the said Vick to the said Hughes, according to the terms thereof. And prays for such compensation as is equitable and right in the premises; and such other and further relief, etc.

The appellee, in his answer, admits the contract as set forth in the bill; but denies that there was any fraud or mistake between the parties thereto in relation to the sale and purchase of the

land which was in part the subject of it. He further states that, according to the terms and true purpose of said contract, he did assign and transfer to said Hughes, the certificates therein specified, and delivered to him entire possession of the premises, in faithful execution of his contract, which was so accepted by the said Hughes. He admits, from information, that upon a resurvey of the lands mentioned in said certificates, there was a deficit, as set forth in the bill. And in conclusion states expressly, in answer to that part of the bill relating to the delivery of the stock, that the same was delivered to the said Hughes in pursuance of the contract. And prays to be discharged, etc. The decree of the court below dismissed the bill at the cost of the appellant.

Upon this statement of facts, the question presented is, whether the appellant is entitled to any redress for the deficiency in the quantity of land specified in the certificates transferred under the agreement?

It is unquestionably established by the adjudged cases, and on great and essential grounds of justice, that relief can be had against a deed or contract in writing, founded in mistake or fraud. In reference to mistakes in deeds and written contracts, it seems to be well established, that they are relieviable only in those cases in which express evidence can be adduced of the intention of the parties: 1 Fonbl. 117. Mistakes may be shown in such cases by parol proof, and relief granted to the injured party, whether he sets it up affirmatively by bill, or as a defense.

We look in vain in this record for anything like express evidence of mistake, or any evidence at all on the subject; but on the contrary, the answer positively denies the fact. The application of these principles of law to the case here presented, however, is not more decisive of the appellant's claim, than a fair construction of the contract itself. The appellee bargained and sold to the appellant the following described lands, to wit: certificate No. 879 for fractional section No. 10, T. 16, R. 4 E., in the district of land offered for sale at Washington, Mississippi, containing five hundred and seventy-two acres, also the north quarter of No. 892 of section 17, T. 16, R. 4 E., and the west half of the same section in the district aforesaid.

It is to be observed that the title to these lands was imperfect, and the description without any specification of quantity. The quantity of five hundred and seventy-two acres mentioned in the contract is deemed but descriptive of the certificate in connection with which it is mentioned; and it is believed to be well

settled, that the conveyance of a particular tract without a specification of quantity, does not bind the vendor to warrant the particular number of acres, although there may have been an expectation in both parties, founded on documents and other evidence known to both, that the number of acres would be greater than it appears to be before a subsequent survey: 2 Rand. 51.

The lands which were ultimately to be secured by virtue of the certificates assigned, appear to be the only lands which, in the contemplation of either party, were sold or purchased under the articles of agreement set forth. This view of the contract is fully sustained by that portion of it which prescribes the conveyance. It will be observed that the appellant only covenants to deliver entire possession and transfer the certificates above mentioned; which covenant appears long since to have been fulfilled, and the transfer accepted by the appellant's intestate. And even the rule under which the appellant claims, that when land is sold as for a certain quantity, a court of equity will relieve if the quantity be deficient, is only applicable to contracts for the sale of land in a settled country, where the titles are complete, the boundaries determined, and the real quantity known or capable of being ascertained by the vendor: 12 Wheat. 574.¹

But one point more remains to be disposed of, and that is relative to the delivery of the stock mentioned in the contract. The appellant has wholly failed to establish the non-delivery as charged in the bill. The delivery is expressly asserted by the answer and established by the testimony in the case.

We are therefore of opinion that the decree of the chancellor should be affirmed, with costs.

WILCOX v. McNUTT.

[2 HOWARD, 776.]

INDORSER RESIDING IN THE PLACE WHERE THE NOTE IS DISHONORED, is entitled to personal notice of the dishonor, or in case he is temporarily absent, to have the notice left at his dwelling-house or place of business. USAGE OF THE NOTARIES TO NOTIFY RESIDENT INDORSERS through the post-office, can not deprive such indorser of his right to personal notice.

ASSUMPSIT. The opinion states the case.

Harrison, for the appellants.

Holt, contra.

1. *Tucker v. Cocks*.

2. *Dunlap v. Dunlap*.

By Court, PRAY, J. This was an action of trespass on the case in the court below against the appellee, as indorser of a promissory note for thirteen thousand and thirty-three dollars, drawn by one James C. Mitchell. The trial was had upon a plea of *non assumpsit*, and a verdict and judgment for the defendant. From which the plaintiffs have appealed to this court.

The errors assigned are: 1. The court below erred in the giving of the introductions asked for by the defendant; 2. The court erred in refusing to give the instructions asked for by the plaintiffs; 3. The court erred in refusing to permit the witness, William Everett, to answer the questions as put to him by the plaintiffs' counsel; 4. The court erred in excluding from the jury all the evidence offered in reference to the established custom of giving the indorsees resident in Vicksburg notice of non-payment and protest.

The instructions mentioned in the first assignment of error are:

1. That the jury must disregard all the statements of the different witnesses showing, or conducing to show, the existence of any custom or practice, however general, of giving notice of protest through the Vicksburg post-office to indorsers resident in Vicksburg.

2. That if the jury believe the note sued on was, on the twenty-fourth day of January, 1837, protested at the Planters' bank in Vicksburg for non-payment, and that defendant was then a resident of Vicksburg; and no other notice of said protest was given to him than by a letter addressed to him at Vicksburg, and placed in the Vicksburg post-office, that such notice is insufficient to charge him, and they must find for the defendant.

3. That if they believe the defendant was, at the time of the protest of the note sued on, a resident of the city of Vicksburg, having a dwelling-house therein, that notice of said protest must have been given to him, either personally or by notice left at his dwelling-house or place of business in said city; and that no custom which may have obtained among the notaries of Vicksburg, of giving notice to indorsers resident therein through the post-office, will legalize such mode of giving notice or charge the defendant.

We have no doubt of the correctness of these several charges. The invariable rule is, that when the parties reside in the same city or place, notice of the dishonor of bill or notes must be personal, or something tantamount, such as leaving it at the dwelling-house or place of business of the party, if absent. If the party to be served with a notice, resides in a different place

or city, then the notice may be sent through the post-office, to the post-office nearest the party entitled to notice. It would be extremely embarrassing to suffer the rule to fluctuate, by making exceptions which would lead to uncertainty. It is of the utmost importance to mercantile transactions, to have a certain and stable rule in relation to notices: 20 Johns. 372.¹ It is dangerous in all cases to disregard the well-settled law upon this subject, and rely upon custom and usage; because no usage or custom can change the rule here laid down, unless the party to be affected be conusant of the usage, and has in other cases conformed to it. 4 Mass. 252, 258;² Id. 157.³

In the case of *Blanchard v. Hilliard*, 11 Mass. 88, the court say: "We have in several instances recognized the usage of banks at which the parties have been accustomed to transact business, not as forming rules for our decisions, but as evidence of the assent of the parties to such usages, and of their waiving their legal claims." This position could by no means authorize two or three notaries to set up their illegal acts in giving notice of protested notes and bills, as a custom or usage, which is to change the settled law upon this subject. Even if such usage had legally existed, as was urged by the counsel for the plaintiff, it could not from the case above cited, have affected the present appellee; because he could not have been cognizant of an usage which did not exist at the time of his indorsement of the note sued on.

The instructions to the jury moved by the counsel for the plaintiff, and the rejection of which is assigned as the second cause of error are: That the jury must find for the plaintiffs, provided they believe from the evidence, that the defendant and his family were, at the time of the protest, temporarily absent from their residence in Vicksburg; and that the notary gave to the defendant, on the day of the protest, and during such temporary absence, written notice of such protest, by means of such notice being deposited in the Vicksburg post-office, directed to him at Vicksburg. These instructions were properly refused. The notice must be personal in such a case, or something tantamount, such as leaving it at the dwelling-house or place of business of the person temporarily absent.

As to the fourth error assigned, we are satisfied that the court below acted correctly in arresting the testimony of Everett. It was only tending to establish a custom among the notaries of Vicksburg, which, were it even established, could not, in our

1. *Smedes v. Bank of Utica*.2. *Jones v. Fales*.3. *Churchill v. Suter*.

judgment, affect the rule of law we have before recognized. No such custom, by public officers, in violation of law, can change, or in any way affect the application of the law itself.

The judgment of the court below must be affirmed, with costs.

NOTICE THROUGH THE POST-OFFICE IS NOT SUFFICIENT to charge a resident indorser, where no ignorance of his place of domicile, nor endeavor to discover it if unknown, is shown: *Miranda v. City Bank*, 26 Am. Dec. 781.

HINDS v. BRAZEALLE.

[2 HOWARD, 837.]

A STATE WILL NOT ENFORCE CONTRACTS MADE ELSEWHERE by its citizens, if they are in violation and fraud of its laws.

WHERE ONE LEAVES THE JURISDICTION TO PERFORM AN ACT FORBIDDEN by the general policy and by the laws of the state, and immediately after the performance returns, his act will be treated as nugatory by the tribunals of his state whether or not it was legal where performed.

BILL in equity.

McMurren and Clark, for the appellants.

Holt, contra.

By Court, SHARKEY, C. J. The complainants, who are the appellees, claim the property mentioned in the bill as heirs at law of Elisha Brazealle. The allegations in the bill disclose these facts. Elisha Brazealle left this state, where he permanently resided, some time in the year 1826, and took with him to the state of Ohio a negro woman and her son, John Munroe Brazealle, for the purpose of emancipating them, and with the intention of bringing them back to this state. That he accordingly executed the deed of emancipation whilst in Ohio, and returned with the negroes to his residence in Jefferson county, where he continued to reside until his death. By his will executed after the deed, he recited the fact that such a deed had been executed, and declared his intention to ratify it, and devised his property to the said John Munroe, acknowledging him to be his son. His executors proved the will and took charge of the estate, and have continued to hold it and receive the profits. The complainants claim the estate on the ground, that the deed of emancipation was void as being contrary to the laws and policy of this state, and that being so, the said John Munroe is still a slave and incapable of taking by devise, or holding

property. The respondents demurred to the bill, which was overruled by the chancellor and this appeal taken.

The deed of emancipation is not made an exhibit, but the bill alleges it to have been made in the manner and for the purpose described, and it is referred to and ratified by the will. The validity of this deed is the main question in the controversy.

Upon principles of national comity, contracts are to be construed according to the laws of the country or state where they are made, and the respective rights and duties of parties are to be defined and enforced accordingly. As these laws derive their force entirely from comity, they are not to be adopted to the exclusion of state laws, by which the great and fundamental policy of the state is fixed and regulated. And hence it follows that this rule is subject to exceptions. No state is bound to recognize or enforce a contract made elsewhere, which would injure the state or its citizens, or which would exhibit to the citizens an example pernicious and detestable: *Story Conf. L.* 203; 6 *Mass.* 358.¹

If, then, exceptions are to be adopted, with reference to the contracts made in good faith, how more forcibly would they apply to contracts made with a view to evade the laws of this state. It is a settled and sound principle that no state will enforce a contract made by its citizens elsewhere, in violation and fraud of its laws: *Story Conf. L.* 198.

Let us apply these principles to the deed of emancipation. To give it validity would be, in the first place, a violation of the declared policy, and contrary to a positive law of the state. The policy of a state is indicated by the general course of legislation on a given subject, and we find that free negroes are deemed offensive, because they are not permitted to emigrate to, or remain in the state. They are allowed few privileges, and subject to heavy penalties for offenses. They are required to leave the state within thirty days after notice, and in the mean time give security for good behavior, and those of them who can lawfully remain, must register and carry with them their certificates, or they may be committed to jail. It would also violate a positive law, passed by the legislature, expressly to maintain this settled policy, and to prevent emancipation. No owner can emancipate his slave, but by a deed or will properly attested, or acknowledged in court, and proof to the legislature, that such slave has performed some meritorious act for the benefit of the master, or some distinguished service for the state; and the deed or will can have no validity until ratified by special act of the

1. *Greenwood v. Curtis*; 8 C., 4 Am. Dec. 145.

legislature. It is believed that this law and policy are too essentially important to the interests of our citizens, to permit them to be evaded.

The state of the case shows conclusively, that the contract had its origin in an offense against morality, pernicious and detestable as an example. But above all, it seems to have been planned and executed with a fixed design to evade the rigor of the laws of this state. The acts of the party in going to Ohio with the slaves, and there executing the deed, and his immediate return with them to this state, point with unerring certainty to his purpose and object. The laws of this state can not be thus defrauded of their operation by one of our own citizens. If we could have any doubts about the principle, the case reported in 1 Randolph, 15, would remove them.

And we think the validity of the deed must depend upon the laws of this state, it becomes unnecessary to inquire whether it could have any force by the laws of Ohio. If it were even valid there, it can have no force here. The consequence is, that the negroes, John Munroe and his mother, are still slaves, and a part of the estate of Elisha Brazealle. They have not acquired a right to their freedom under the will; for, even if the clause in the will were sufficient for that purpose, their emancipation has not been consummated by an act of the legislature. John Munroe being a slave, can not take the property as devisee; and I apprehend it is equally clear, that it can not be held in trust for him: 4 Desau. 266.¹ Independent of the principles laid down in adjudicated cases, our statute law prohibits slaves from owning certain kinds of property, and it may be inferred that the legislature supposed they were extending the act as far as it could be necessary to exclude them from owning any property, as the prohibition includes that kind of property which they would most likely be permitted to own without interruption, to wit, hogs, horses, cattle, etc. They can not be prohibited from holding such property in consequence of its being of a dangerous or offensive character, but because it was deemed impolitic for them to hold property of any description. It follows, therefore, that the heirs are entitled to the property.

As the deed was void, and the devisee could not take under the will, the heirs might, perhaps, have had a remedy at law; but as an account must be taken for the rents and profits, and for the final settlement of the estate, I see no good reason why

1. *Dynum v. Bostick*.

they should be sent back to law. The remedy is, doubtless, more full and complete than it could be at law.

The decree of the chancellor overruling the demurrer must be affirmed, and the cause remanded for further proceedings.

NO COUNTRY WILL ENFORCE A CONTRACT MADE ELSEWHERE, if the enforcement would be to its injury, or if the contract is of a kind prohibited by the provisions of positive law: *Saul v. His Creditors*, 16 Am. Dec. 212 and note, 231; *Arayo v. Currell*, 20 Id. 286.

WITHERSPOON v. SPRING.

[3 HOWARD, 60.]

LEVY OF A FIERI FACIAS FOLLOWED BY THE TAKING and forfeiture of a forthcoming bond constitutes full satisfaction of the judgment, and therefore a second execution will be void.

ERROR to the circuit court of Franklin county.

Stuart, for the plaintiff in error.

By Court, PRAY, J. This cause came up from the circuit court of the county of Franklin. The material facts of the case are as follows: At the April term of said court, in the year 1833, the defendant in error obtained a judgment against the plaintiff for the sum of two hundred and forty-five dollars and fifty-three and one fourth cents. On the twenty-third of August, of the same year, he sued out a writ of *fiery facias* upon the judgment so rendered, returnable to the ensuing term of October. This writ was duly levied on the property of this plaintiff, a forthcoming bond taken by the sheriff and forfeited.

On the third of September, 1834, a second writ of *fiery facias* was sued upon the same judgment, which was also levied on the property of the plaintiff, and a forthcoming bond taken. At the term of October, in the same year, the return term of the last-mentioned execution, motion was made to quash the same, together with the levy, and bond made and taken in pursuance thereof for the following reason: "That the judgment upon which said execution was awarded, had been fully satisfied by the levy of a former execution, and the taking and forfeiture of a forthcoming bond." This reason, although fully established in the court below, was deemed insufficient to sustain the motion, which was accordingly overruled, and the cause brought to this court by writ of error.

It has long been the settled law of this court, that the levy of

a writ of *fiery facias* followed by the taking and forfeiture of a forthcoming bond, is a full satisfaction of the judgment upon which the execution was issued. This law being applied to the case before us, it will appear that the second execution, levy, and bond were absolutely void.

The judgment of the court below must, therefore, be reversed, and the motion to quash sustained.

DOE EX DEM. VAN CAMPEN v. SNYDER.

[3 HOWARD, 66.]

QUASHING AN EXECUTION WILL NOT DEFEAT A SALE previously made under it.

A SHERIFF WILL NOT BE HEARD TO CONTRADICT HIS OWN RETURN upon an execution, though the suit in which he is offered for that purpose, is one between third parties.

PURCHASER OF LANDS UNDER EXECUTION ISSUED UPON A SATISFIED JUDGMENT will hold the same if nothing of record showed the satisfaction; though he was warned at the time of the sale by the execution defendant that the sale was illegal and void.

EJECTMENT. The title of defendant in error accrued by virtue of a purchase at a sale of the land under a *fiery facias* issued against William Vannersen. Subsequent to the sale the writ was quashed. Plaintiff in error, upon the trial, offered to prove this. He also offered to prove by the sheriff that at the time of the sale the execution was satisfied, and by the same witness that defendant in error was notified by Mr. Vannersen that the sale was illegal and void, after the property was bid off by defendant, but before he had paid anything upon his bid. The court, however, refused to admit any of this testimony.

Webber and Vannerson, for the plaintiff.

Winchester, contra.

By Court, PRAY, J. We have no hesitation in laying down the general rule, that the quashing of an execution can not defeat a sale previously made in pursuance of it. In a case of ejectment by the purchaser at sheriff's sale against the defendant, in execution, reported in 3 Wash. C. C. 546,¹ it was held, that the latter can not question the title; for the sheriff in making sale stands in the situation of attorney to the defendant. Even when a judgment has been reversed, a sale of goods under

1. *Cooper v. Galbraith*.

execution before reversal shall stand: Com., tit. Execution (C. 3), 560, 906; 2 Cro. Jac. 46;¹ Dyer, 363a.

In the second place, we regard the position taken as clearly untenable. It is in fact presenting the sheriff as a witness to impeach his own return. Even if the judgment had been paid as alleged, the authorities cited at bar establish the position, that an execution, if returned, and indorsed unsatisfied, though in fact paid, an *alias* issuing after it, is regular: *Luddington v. Peck*, 2 Conn. 700. And a *bona fide* purchaser of lands under an execution issued upon a judgment, which had been paid, but on which no satisfaction had been entered of record, nor an execution returned, would be protected in his purchase: *Saunders v. Caldwell*,² 1 Cow. 622.

These two points being thus settled, we deem it perfectly immaterial whether Mr. Vannersen did or did not give the notice stated in the bill of exceptions. The sale being a good one, his notice could have had no effect upon it.

The opinion of the court below, in relation to the matters contained in the bill of exceptions having been sustained by this court; and these matters being all that could have been urged for a new trial, it follows as a necessary consequence that we are satisfied that the court below was right in refusing it.

The judgment below must be affirmed with costs.

QUASHING WRIT OF EXECUTION, EFFECT OF.—The rule that regulates the effects that spring from the quashing of an execution, seems to be this, that the quashing shall not operate to the prejudice of innocent third parties, but as to the plaintiff in execution, shall place him in the position of having caused the acts done under the execution prior to the quashing, to be done without warrant of law. In accordance with this it is held that the quashing of the writ will not defeat the sale previously made by virtue of its authority, if the purchaser at the sale was a third party, ignorant and innocent of the irregularity that has caused the writ to be quashed: *Chambers v. Stone*, 9 Ala. 260; *Adamson v. Cummins*, 10 Ark. 544; *Bumpass v. Webb*, 3 Ala. 112; *Coz v. Nelson*, 1 Mon. 95; S. C., 15 Am. Dec. 93; *Schobee v. Dedman*, 2 Litt. 116. And if the party moving to have the writ quashed desires the purchase of a third party thereunder set aside, he must show such third party to have occasioned or have been cognizant of the irregularity which affords ground of attack upon the writ: *Adamson v. Cummins*, *supra*; *Chambers v. Stone*, *Id.* As to the plaintiff in execution, the case is different; his purchase will be vacated by the quashing: *Sanders v. Ruddle*, 2 Mon. 139; and also the serious consequence follows that he is no longer protected as to past acts done under the authority of the writ, and is liable in trespass therefor: *Hayden v. Shed*, 11 Mass. 500; *Chapman v. Dyett*, 11 Wend. 31; S. C., 25 Am. Dec. 598; *Kerr v. Mount*, 28 N. Y. 659. The preceding remarks of course do not in any way apply to the cases of void executions, for as in these cases a purchaser, however

1. *Goodyers v. Ince*, Cro. Jac. 246.

2. *Jackson v. Caldwell*.

innocent he may be, acquires no title, the quashing of the writ can place him in no better position. This whole subject is treated of in the note to *Cox v. Nelson*, 15 Am. Dec. 95.

PURCHASER UNDER SATISFIED JUDGMENT will take a good or bad title, where the satisfaction does not appear of record, just accordingly as he had or had not actual notice of the satisfaction: *Hoffman v. Strohecker*, *post*. The decided preponderance of authority supports the proposition that a sale under a satisfied judgment is absolutely void, no matter how ignorant or innocent the purchaser may be: *Freeman on Judgments*, sec. 490.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

ELLIOTT v. LEAKE.

[5 MISSOURI, 208.]

ACKNOWLEDGMENT TO REMOVE BAR OF THE STATUTE OF LIMITATIONS must recognize the original existence of the debt, that it yet remains unpaid, and must have been made within the period of limitation.

ACKNOWLEDGMENT THAT A DEBT EXISTS AND IS UNPAID, made after the original cause of action has been barred by the statute of limitations, is the basis of a new cause of action.

WHAT SUFFICIENT ACKNOWLEDGMENT THAT A DEBT IS UNPAID.—Where a party who has received money on a parol contract for the sale of lands, long after the implied assumpsit arising upon the payment has been barred by the statute of limitations, acknowledges that he received the money, asserts that “he never denied it,” that “the money was just,” etc., and expresses his willingness to make a deed for the land to which the contract related, the recognition that the debt is unpaid, is sufficient to authorize a jury in finding against the plea of the statute of limitations.

ASSUMPSIT. The opinion illustrates the case.

Anderson, for the appellant.

Wright, for the appellee.

By Court, EDWARDS, J. This was an action of assumpsit, brought by Leake against Elliott. Pleas, *non assumpsit* and statute of limitations, and issue on each. Eighteen or twenty years ago, Elliott and Leake resided in the state of Kentucky; and while there, and about that time, Elliott sold Leake twenty acres of land for two hundred dollars. The contract was never reduced to writing. Leake paid Elliott the two hundred dollars, the price of the land. In 1834 Elliott admitted that he “had got from Leake two hundred dollars, for land in Ken-

tucky, and that he had never denied it." "That he had got two hundred dollars for land sold to Leake in Kentucky; that he had never denied it was right." "That the two hundred dollars were just, but that he did not receive the ten dollars." And in another conversation, about the same time, Elliott said he "had sold to Leake twenty acres of land, in Kentucky, for two hundred dollars; and that he had received the money."

Elliott said he was willing to make Leake such a deed as he had. That he had got from Leake two hundred dollars in consideration of twenty acres, which he had sold to Leake, in Kentucky, eighteen or twenty years ago; and that there was no writing between them; and that he was then ready to make Leake a deed for said land, and had always been ready to do so. Leake said he would take a general warranty deed. Elliott said he would make him such a deed as he had. The law of Kentucky, on the subject of parol contracts as to land, and under which this contract was made, was introduced and read in evidence. By this law it is declared and enacted, that parol contracts, as to the sale of lands, are null and void. Leake had verdict and judgment. Elliott moved for a new trial, and the court overruled the motion. The error assigned is the refusal to grant a new trial.

It is insisted by Mr. Anderson, for the appellant, that it is clear from the evidence that the demand sued on originated fifteen or sixteen years ago, before the institution of this suit. That there had not been, within ten years previous to the institution of the suit, any express promise to pay the sum demanded or any part thereof; and that there has been no direct and unqualified admission of a previous subsisting debt, which the defendant is liable and willing to pay. In support, he cites several authorities, and among others, *Bell v. Morrison*, 1 Pet. 351.

It is insisted by Mr. Wright, for the appellee, that certain acknowledgments made by Elliott, take this case out of the statute of limitations. The contract of sale being void, Leake could maintain assumpsit for money had and received; and if brought within five years, all the evidence requisite to obtain judgment would be the reception of the money on a parol contract for land. The law will imply the promise to pay. This action is brought after five years, but the evidence is exactly what would have sustained the action within the period of limitation. Does the law require stronger evidence to revive an obligation than it does to create it? Mr. Wright seems to think not.

It may not require stronger evidence to revive an action than

it does to create it, but it certainly requires more evidence. **The acknowledgment of the receipt of money, on a parol contract for lands, would support assumpsit for money had and received, if brought within the period of limitation, but not so if brought after that period. The law would presume that the debt had been discharged, and the defendant would not be required to show that he had discharged the debt. To make a case that can be taken out of the statute, there must be an original debt barred by the statute, a subsequent acknowledgment of the original debt not barred by the statute, and an acknowledgment that the debt remains unpaid. The acknowledgment of the debt, and that it remains unpaid, form the basis for a new action; and it is upon the ground that a new cause of action has been created that these cases are considered out of the operation of the statute. It is not necessary that the party should acknowledge his willingness to pay the debt; it is sufficient that he acknowledged that he owed the debt, and that it remains unpaid. That evidence which will create an obligation will revive that obligation, if connected with evidence that the obligation has not been discharged. A principal ingredient in reviving a debt barred by the statute, is the evidence that it is still subsisting: *Bell v. Morrison*, and the cases there cited, 1 Pet. 351.**

In this case, Elliott received from Leake, fifteen or twenty years ago, two hundred dollars, for no consideration. He has acknowledged the receipt of the said two hundred dollars, within the last five years. Here are two of the requisites necessary to take the case out of the statute. Does the third exist? Has he acknowledged that the two hundred dollars remain unpaid? Elliott says he got the money, and "had never denied it." That he had "got two hundred dollars, and had never denied it was right." "That the two hundred dollars were just, but that he had never received the ten dollars." Do these expressions show that the two hundred dollars remain unpaid? They were used by Elliott in a conversation, in which he expressed a wish to settle the difficulty between himself and Leake, and in which he said he had got two hundred dollars from Leake, for land sold in Kentucky. That he was willing to make a deed for the land. Leake said he would take a general warranty deed. Elliott replied he would make him a deed, such a one as he had. "The two hundred dollars were just, but he had never received the ten dollars." Why were they just? Because he had received them and gave no consideration for them. To whom were they just? To Leake, because he had received them

from Leake, "but he had never received the ten dollars" and therefore they were unjust. I am not very well satisfied that this evidence is of a character as clear and conclusive as should be required to show the continued liability of the party; yet it is far from being clear that it was insufficient to justify the jury in their finding.

The court committed no error, then, in overruling the motion for a new trial. The judgment should be affirmed; and the other judges concurring, it is affirmed.

AN ACKNOWLEDGMENT OF UNPAID INDEBTEDNESS will take the case out of the statute of limitations without its being requisite that there should have been any expression of willingness to remain bound: *Carr v. Hurlbut*, 41 Mo. 268, citing the principal case. That from such an acknowledgment a promise to pay will be implied: See *St. John v. Garrow*, 29 Am. Dec. 280, and note.

LITTLE v. LITTLE.

[5 MISSOURI, 227.]

SUIT INSTITUTED BY PROCESS THAT DOES NOT RUN IN THE NAME OF THE STATE may be dismissed upon motion of the defendant, though prior to the motion he has appeared in the action for other purposes; and though the statute authorizes like suits to be instituted "either by voluntary appearance and agreement of the parties or by process."

SCIRE FACIAS. The opinion states the case.

J. Spalding, for the plaintiff.

T. Polk, contra.

By Court, EDWARDS, J. This was a suit before a justice of the peace in which George M. Little was plaintiff, and James M. Little defendant, commenced upon a judgment obtained some years before. The process was a *scire facias*, running in the following words: "State of Missouri, county of St. Louis, ss. To the constable of St. Ferdinand township, in said county, greeting. Whereas," etc. The defendant appeared and declared himself ready for trial before the justice, and a jury was sworn and found a verdict for defendant. The plaintiff appealed to the circuit court. There the defendant caused the witnesses which he had had subpoenaed by that court in this cause to be called, and upon their answering, the defendant, by his counsel, remarked that, before the jury was sworn, he had a motion to make in the cause; and thereupon moved the court to dismiss the

appeal, upon the ground that the process was insufficient, not running in the name of the state, and not in conformity with the statute; and the court decided that said process was irregular and insufficient, and that the appeal must be dismissed, and thereupon dismissed the case.

The defendant insists that, if the process was irregular in any respect, such defect was cured by the appearance of the defendant, and going to trial on the merits; and refers to section 4, page 350, revised code of 1835, and to 3 Mo. 369. The section of law referred to, provides that "suits may be instituted before a justice, either by voluntary appearance and agreement of the parties, or by process." In this case, the parties have chosen to commence by process; and if that process was defective in deviating from the statute law only, the appearance of the party and going to trial on the merits, would cure those defects; and to this effect was the decision in the case of *Barnett and Ivers v. Lynch*, in 3 Mo. 369. In that case, the summons required the defendant to "appear and answer Thomas Barnett and ——— Ivers"—omitting the given name of Ivers; and the court decided that if the objection could have been raised at any time, it was certainly waived by the repeated appearance of the defendant, and the proceedings before the justice. But the objection here is of a higher character. The process does not run in the name of the state. The constitution requires that "all writs and process shall run in the name of the state of Missouri." The writ commences, "State of Missouri, county of St. Louis, ss." These words merely fix the venue of the action. After these should follow, "State of Missouri, to the constable of St. Ferdinand township, greeting," etc. As the process does not run in the name of the state, the appeal from the justice was properly dismissed by the circuit court.

The judgment of the circuit court ought therefore to be affirmed, and the other judges concurring, it is affirmed.

In *Pixley v. Winchell*, 17 Am. Dec. 525, it was held that the appearance of the defendant would not be set aside, though the process by which the action was instituted was absolutely void, for by his appearance he was regularly in court, whether there was any process or not.

GRIMSLEY v. RILEY'S ADM'RS.

[5 MISSOURI, 280.]

TO CONSTITUTE A SEALED INSTRUMENT under the statute, it must express in its body that it is sealed, and the persons executing it must affix scrawls by way of seals.

A FLOURISH IN CONTINUATION of the last letter of a name upon the affixing of a signature, is not such a scrawl as will constitute a seal, where it is not made by way of seal, though the instrument to which the signature is affixed expresses on its face that it is sealed.

DEBT on bond. The opinion states the case.

J. Spalding, for the plaintiff in error.

J. B. Bowlin, *contra*.

By Court, EDWARDS, J. The administrators of Riley sued Grimsley, Fleischman, and Thompson, in the St. Louis circuit court, upon an alleged sealed instrument. Grimsley pleaded: 1. That the supposed writing obligatory declared on was not his deed; 2. That the slaves mentioned in the said writing, were never delivered and used under and in virtue of said writing obligatory; 3. That plaintiffs were not administrators of said Riley.

To the second plea the plaintiffs demurred, and the demurrer was sustained. On the trial of the issues on the two other pleas, there was a finding and judgment for plaintiffs below, and Grimsley moved for a new trial, because there was no evidence that either of said defendants sealed the supposed obligation sued on, and the court overruled the motion; to which decision of the court the defendant excepted.

The bill of exceptions states that, on the trial of this case, the plaintiff, to prove his case, gave in evidence the following paper:

"St. Louis, August 17, 1836. Twelve months after date, we or either of us promise to pay to P. McGovern and Hugh O'Neil, administrators of Michael Riley, deceased, the full and lawful sum of one hundred and sixty dollars, it being for the hire of two slaves, named Levi and George—that is, one hundred and thirty-two dollars for Levi and thirty-six dollars for George, for twelve months from this date, belonging to the estate of said Riley; and we and each of us further bind ourselves to furnish said slaves with as good boarding, clothing, and medical aid as is usual for such persons, and to deliver said slaves at the expiration of said term to the aforesaid administrators, in the city of St. Louis, state of Missouri. Witness, our hands and seals this day and year aforesaid. Fleischman & Thompson, T. Grimsley."

The errors assigned are: 1. That the court admitted improper evidence; 2. that the court overruled the motion for a new trial.

The point mainly relied on by the plaintiff in error is, that the instrument offered in evidence is not an instrument under the seal, and was therefore improperly admitted in evidence in this action. By sec. 3, p. 118, revised code of 1835, it is provided that "every instrument of writing, expressed on the face thereof to be sealed, and to which the person executing the same shall affix a scrawl by way of seal, shall be declared and adjudged to be sealed." Under this law, two things are necessary to constitute an instrument a sealed instrument: 1. It must be expressed on the face thereof to be sealed; 2. The person executing the same shall affix a scrawl by way of seal. The instrument offered in evidence here has but one of those requisites. It is expressed on the face of it to be a sealed instrument, but the person executing it has affixed no scrawl by way of seal. A mere flourish of the pen, in continuation of the last letter of a man's name in affixing his signature, is not such a scrawl as will constitute a seal, where it is not made by way of seal.

In this case there is no evidence that either of the parties sealed the instrument offered in support of the action, and for this reason the defendant's motion for a new trial should have been sustained; and the circuit court erred in overruling it. The judgment ought, therefore, to be reversed, and the other judges concurring, it is reversed.

TO CONSTITUTE AN INSTRUMENT A SEALED INSTRUMENT under the Missouri statute, it must express on its face that it is sealed, and must have a scrawl affixed by way of seal: *Moreau v. Detchemendy*, 41 Mo. 431; *State v. Thompson*, 49 Id. 188, citing the principal case. To a like effect is *Walker v. Keile*, 8 Id. 301.

Where a written contract has a scroll annexed thereto opposite the signature, with the word "seal" written thereon, but the scroll is not recognized in the body of the instrument as a seal, the instrument is not a deed: *Cromwell v. Tate*, 30 Am. Dec. 506.

WINELAND v. COONCE.

[5 MISSOURI, 296.]

JUDGMENT OF A JUSTICE MAY BE FILED IN THE CLERK'S OFFICE so as to create a lien upon the lands of the judgment debtor at any time after it has been rendered, but the lien can not be enforced until execution against the goods has been returned unsatisfied.

INNOCENT PURCHASER FROM A FRAUDULENT GRANTOR, paying a valuable consideration, will hold the property against the creditors of the fraudulent grantor.

EJECTMENT. The opinion states the case.

J. Spalding, for the plaintiff in error.

H. R. Gamble, *contra*.

By Court, McGIRK, J. Coonce brought an action of ejectment against Wineland for a lot of ground in the city of St. Louis, in the circuit court of St. Louis county. Plea, not guilty. The cause was tried by the court without a jury. A verdict and judgment were given for the plaintiff, Coonce. To reverse this judgment the cause is brought here. It appears by the record, that some time before the thirteenth of July, 1829, one Molloy was indebted to Scott & Rule, of St. Louis, and at the same time he was indebted to one Charles Mullikin; and that, also, prior to said thirteenth of July, 1829, he, Molloy, owned the lot of ground sued for; that on the thirteenth of July, Molloy, to defeat and defraud these creditors, made a deed of the lot to one McCaffery, who took the same with like knowledge and intent; that on the twentieth of July, this deed was recorded. On the sixth of August, 1829, Mullikin commenced suit before a justice. Scott & Rule commenced suit against Molloy before a justice the twenty-fifth of September. Mullikin had judgment before a justice the fifteenth of August. Scott & Rule had judgment before a justice on the twenty-sixth of October; on the twenty-eighth they filed their transcripts in the clerk's office; on the twenty-seventh of October, Scott & Rule took execution from the justice against Molloy; on the fourteenth of April, 1831, an execution issued against Molloy from the clerk's office on the justice's judgment; it was levied on the lot, and sold to Scott & Rule; the sheriff made them a deed the eighteenth of August, 1831, and they recorded the same the twenty-fifth of August, 1831; they then sold to Coonce. From the judgment of Mullikin, rendered before the justice on the fifteenth of August, 1829, Molloy appealed to the circuit court, and gave McCaffery as security; on the eighteenth of January, 1830, judgment on the appeal was given against Molloy and McCaffery in this circuit court; execution issued against them on the fifth of March from the circuit court, and was levied on the lot, and sold the thirtieth of March, by the sheriff to Mullikin; a deed was made by the sheriff to him that day, and recorded the second of April, 1830; then Mullikin sold to Keyte the first of April, 1830, under whom Wineland claims. With regard to the respective dates and registry of the mesne conveyances, I will take no notice, as I deem it immaterial.

It appears that the fact, that an execution had been issued by

the justice and returned *nulla bona*, was proved by the production of a certified copy from the justice. It was insisted by the counsel that this could not be done, but that before the party can file his judgment in the clerk's office, he must wait till the justice issues an execution, and till the same is returned *nulla bona*; then he can take a transcript of the whole to the circuit court and have his lien to commence. The law says the judgment of the justice shall be a lien on the land of the defendant from the time of filing the same in the clerk's office, but forbids that lien to be enforced by execution from the clerk's office till it is ascertained the goods of the defendant are insufficient to pay the debt. What the evidence shall be to prove the fact, the act does not declare. It is then to be proved, when an action arises to require it, by legal testimony. By our law, a certified copy from the justice is such evidence: See revised code of 1835, p. 250, sec. 4, of the act concerning evidence.

The next point for consideration is, whether the *bona fide* purchaser from a fraudulent grantee, for a valuable consideration, without notice of the fraud, shall hold the property against the creditors of the fraudulent grantor. In this case, Molloy being indebted to both Mullikin and Scott & Rule, to defeat them, fraudulently conveyed to McCaffery. Neither Scott & Rule nor Mullikin had any knowledge of this fraud. Then they both sued Molloy before a justice, and had judgment; from the judgment in favor of Mullikin, Molloy appealed, and gave this McCaffery for his security, and the circuit court gave judgment against both, and on the execution the sheriff sold the lot as the lot of McCaffery to Mullikin. This, then, is still the same question. What would the law be in case McCaffery had sold it himself to a *bona fide* purchaser for value, who had no notice of the fraud at the time of the purchase?

This brings up the consideration of the statute of this state respecting fraudulent conveyances. The act which was in force at the time this transaction took place is to be found in the revised code of 1825, p. 401; by the second section of which it is declared that "every gift, grant, or conveyance of land, etc., made or contrived of malice, fraud, covin, collusion, or guile, to the intent, or for the purpose of delaying, hindering, or defrauding creditors of their just and lawful actions, suits, debts, etc., or to deceive those who shall purchase the same, shall henceforth be deemed and taken (except against the person making the same and his representatives) to be clearly and utterly void."

Upon the statute, Mr. Gamble, of counsel for Coonce, con-

tends that, as the deed is utterly void as to all the creditors of Molloy, the first person who sells Molloy's right by execution, and purchases the same, has the clear legal right. This can not be true according to the proviso of the act, for by the fourth section of the act, it is also expressly enacted that "this act shall not extend to any estate or interest in any land," etc., which shall be upon valuable consideration, and *bona fide* and lawfully conveyed as aforesaid, nor to any person or persons, body politic or corporate, who may be subsequent purchasers for valuable considerations, without notice. This proviso fits the very case at bar. What was Mullikin but a subsequent purchaser of McCaffery's right, for a valuable consideration, without notice?

The act does not say what sort of subsequent purchaser shall not be affected by it, whether a subsequent purchaser of the fraudulent vendor or vendee, but must apply and be applied to the purchasers of the vendee, where there is one, rather than to the purchasers of the fraudulent vendor, after he has already parted with all his interest, for the act declares that as to him his title is forever gone, unless creditors know of the fraud and pursue it in time.

But on this point we are not without light. Our statute is, in the first part, a copy of the statute of 13 Eliz., and the latter part, regarding subsequent purchases, is a copy of 27 Eliz. These statutes, in some form or other, with their proviso, have been before the English and American courts, in at least twenty instances, and the decisions have been uniformly, that a person being in the condition Mullikin was when he purchased the lot, would hold it against the world: See 2 Sug. 198, to this point; 3 Bac. Abr. 307, 308, 309, and the division thereon *passim*; 13 Johns. 471;¹ 18 Id. 515;² 6 Cr. 133.³ The foregoing is enough to settle the doctrine, and nothing has been shown to the contrary.

I am of opinion the judge erred in deciding the law for Coonce. The judgment of that court, the other judges concurring herein, is reversed and remanded for a new trial.

BONA FIDE PURCHASER from a fraudulent purchaser, without notice of the fraud, acquires a good title: *Price v. Juntin*, 30 Am. Dec. 685, and note in which the prior decisions are collected. See also *Hoffman v. Strohecker*, *post*.

1. *Jackson v. Terry*. 2. *Anderson v. Roberts*; 5 C., 9 Am. Dec. 225. 3. *Fletcher v. Peck*.

BOYER v. WILLIAMS.

[5 MISSOURI, 335.]

PURCHASER FROM THE UNITED STATES OF PUBLIC LANDS acquires title to the crops growing on the land at the time of the purchase, and which were planted prior thereto by other persons.

TROVER. The opinion states the case.

Cole, for the plaintiff in error.

Frissell, *contra*.

By Court, EDWARDS, J. This was an action of trover, commenced by Williams against the Boyers, to recover damages for the conversion of a crop of wheat. The Boyers pleaded not guilty, and Williams joined issue on this plea. Verdict and judgment for Williams. The Boyers moved for a new trial, and the court overruled the motion. On the trial, Williams proved that in August or September, 1836, he sowed down a field of wheat, which he cut in July following. The Boyers forbade Williams to cut the wheat, and claimed it themselves, and afterwards took it off. The Boyers then gave in evidence a certificate of the receiver of the land office at St. Louis, dated the thirteenth day of September, 1836, for eighty acres of land, including the field of wheat sowed by Williams as above stated.

The defendants moved the court to instruct the jury: 1. That if they believed from the evidence that the defendants entered the land with the United States in September, 1836, upon which the wheat was grown, which is the subject-matter of this action, and that said wheat was sown by plaintiff, on said land, in August or September, 1836, who cut the same against the consent of the defendants, then the plaintiff can not recover in this action.

2. That the purchaser of land from the United States acquires title to the land so purchased, and to everything growing at the time upon the land so purchased. These instructions the court refused, and the defendants excepted.

The errors assigned are: 1. That the court refused the instructions asked; and, 2. That the court overruled the motion for a new trial.

In refusing the instructions asked by the defendants, the court clearly erred. The United States have complete title to the public lands, and complete title to everything growing on the public lands. The purchaser of land from the United States acquires by the purchase the same title to the land, and to every-

thing growing upon the land, which the United States had before the sale. The doctrine of emblements does not apply here. To entitle the party to emblements, the sowing of the land must have been legal. The court erred in refusing to grant a new trial also. The verdict of the jury was against the law and against the evidence.

The judgment of the circuit court ought therefore to be reversed, and the other judges concurring, it is reversed.

PURCHASER FROM THE GOVERNMENT is entitled to the crops which were planted prior to his purchase, though the person by whom the crops were planted had, at the time of the planting, a right of pre-emption: *Razor v. Qualls*, 30 Am. Dec. 658.

BOWER v. STATE.

[5 MISSOURI, 364.]

TO CONSTITUTE MURDER IN THE FIRST DEGREE, the killing must have been done with intent to kill, and that intent must have been formed prior to the time of the deed.

JURY NEED NOT GIVE SAME WEIGHT TO THE DIFFERENT PARTS of the confession of a prisoner, and may even totally disregard that part of the confession which is favorable to the prisoner, if it is contrary to the experience of mankind, or is contradicted by other evidence stronger than itself.

INDICTMENT for murder. The opinion states the case.

Cole and Zeigler, for the appellant.

Brickey, contra.

By Court, McGIRE, J. At the April term of the circuit court for the county of Ste. Genevieve, Bower was indicted by the grand jury of that county for the murder of one George Thompson. The trial was had at the said term; the defendant pleaded not guilty, and a jury found him guilty on both counts in the indictment; both are alike, except one is in the common law form; the other is in the common law form, but contains, also, certain words in a late statute regarding the crime of murder. The prisoner, by Messrs. Cole, Zeigler, and Rezier, of counsel, moved in arrest of judgment and for a new trial, which were overruled, and the court gave judgment of death on the prisoner, to be executed on the ninth day of June ensuing. The prisoner has brought the case here by appeal. Something is said in the record about wrong instructions, but that matter has not been shown at the bar, nor does the record show any-

thing about that matter. The only question for the consideration of the court is, whether or not the circuit court erred in refusing a new trial? The question has not been argued on the motion to arrest the judgment, nor can I perceive any reason why any notice should be taken of it.

The reasons for a new trial are, that the verdict is against law and evidence, that it is against the weight of evidence. The evidence on the part of the state was in substance as follows: That on the last day of January, 1838, the prisoner and one Thompson, or rather (to use the words of the witness), that the prisoner and a young man staid at the house of witness, Mrs. Roussiere, all night, took supper and breakfast, and left her house after breakfast for Ste. Genevieve. The witness lives about five miles on the road from St. Genevieve to St. Louis; both had blue roundabouts; prisoner had on black pantaloons; does not recollect the color of the pantaloons of the other person; prisoner had on a white hat with a black ribbon round it; the other man had on an old fur cap; when they left her house in the morning, prisoner picked up or had a large stick in his hand. The hat produced in court, witness says, is the hat prisoner had on when at her house. The witness identifies the cap brought in court which the other person had on when at her house; describes the buttons of the coat of the other person as being yellow in the middle, and black round the rim, and says those shown in court are the same. These persons came to her house after dark; had but little to say; prisoner never spoke to the other man that evening; is a German, and speaks but little English; both slept in the same bed; next morning the prisoner spoke of his sore toes; that the two appeared friendly in the morning; the prisoner paid fifty cents for his bill, said it was all the money he had, and the deceased said to prisoner, "John, we have to pay the woman seventy-four cents for our lodging and eating," which was paid. The deceased was a young man, had no beard, pale complexion, about sixteen or seventeen years of age, his hair was a little reddish. The witness saw a corpse eight days thereafter which had hair of the same color as the person at her house, and did not recognize him by anything else. Louis Roussiere, a boy, and son of the last witness, says prisoner and a young man, an American, came to his mother's, herein as stated above, and next morning when they went away, saw the prisoner have a stick. Saw a corpse eight days after; that the corpse he saw had hair the same color as the prisoner's companion; that he knew the corpse by nothing but the color

of the hair; describes the buttons as described by his mother; that the men came to his mother's in the night, and left next morning after breakfast.

Felix Dufour says, on the morning of the first of February, he went from Ste. Genevieve with his cart for wood on the road leading from Ste. Genevieve to Potosi, and toward St. Louis; he met two men going on foot towards Ste. Genevieve, near the forks of said road, and about two miles from Ste. Genevieve; the witness went and got his wood, and was gone from that place one hour and a half, and about two hundred yards from the place where he met the men, he saw where something had been dragged across the road, and thought it was a deer; that he followed the trail about fifteen or twenty steps beyond the road, and found the dead body of a man in a gully, stripped of all his clothes, except socks and shirt; the day was cold, but the blood was not frozen; thinks the hat and cap in court are the same the stranger had on; the stick of ash shown in court is the same he saw by the dead body; the hat shown in court the same he found by the dead body; says he did not recognize the dead body.

Henry Morris says, that on the morning of the first of February, he met two strangers on the road, near the place, or about two hundred yards from the place where he found the dead body, one man a little stouter than the other; the largest man was walking behind the other with a stick under his arm; that he came back with Dufour and saw a trail across the road; supposed it was made by dragging a deer across the road; followed Dufour and found a dead body of a white or pale complexion; the same was naked, except socks and shirt, and was covered with leaves; the breast was blue from strokes, and the skull was mashed in; and that the body was about two hundred yards from the place where he met the two men; that he did not recognize the dead body, and that he does not recognize the prisoner. It appears that the place where the dead body was found, is near or about two miles from Ste. Genevieve, on the Potosi and St. Louis road, near the forks; and that Madame Roussiere lives on the St. Louis road, about three miles further towards St. Louis.

Louis Roussiere swears he went out to cut wood on the road the other witnesses speak of, on the first of February, and saw no person in the road; came back with them; saw a small dead man in the gully near the road.

Pierre Labourin says he lives eight miles from Ste. Genevieve, on the St. Louis road; that on the same day the man was found dead in the gully, the prisoner came to his house about twelve or

one o'clock, and took dinner, and said he was going to Dr. Kluke's; started towards Kluke's; had on a little cap and blue roundabout; said he was a blacksmith; the cap in court looks like the cap prisoner had on at his house, if not the same; the man's pantaloons were black and torn; the man was lame.

John Drury, a witness, says that on the same day the man was found dead, the prisoner came to his house about sundown, was walking and was lame, and ate supper, and left his house in about half an hour, went towards Kluke's, and the next morning saw same man coming towards town.

James Capon says that on Tuesday, late in the evening, he saw the prisoner one half mile from Dr. Kluke's; he asked the way to Ste. Genevieve; was in company with a small, spare-made man, light hair; both had blue roundabouts on; the prisoner had on a white hat, and black ribbon on it; the small man had light hair, and an old fur cap; the witness identifies the hat.

Dr. Kluke says, on the first day of February, the prisoner came to his house after sundown, stayed all night, had a sore toe, appeared lame, was distressed and scared, witness thought from pain and lameness, and the prisoner looked as if something was wrong, and did not sleep that night; told the witness he was lost all day; ate breakfast, and started back towards Ste. Genevieve; the witness identifies the cap in court to be the same the prisoner had on at his house.

Austin Follert says, that on Tuesday, the second of February, at two o'clock, the prisoner came to his house; that he lives six miles from Ste. Genevieve, and seven from Dr. Kluke's, and one mile from the Potosi road; the prisoner stayed there half an hour, and he did not speak to him at all.

Joseph Rein saw the prisoner at Follert's at two o'clock; the prisoner told him he came from St. Louis; told the witness he stayed in the woods all night and was lost, and started for Ste. Genevieve.

Martin Zokest says, about two o'clock on the second day of February, the prisoner came to his house, said his name was John Bower, said he came from St. Louis and was going in the country; the prisoner remained at his house eight days, when he was arrested for murder by the sheriff of Ste. Genevieve county.

Louis Van Voert says, he had a conversation with the prisoner in jail. The prisoner said he came from St. Louis in company with two men, and that they pursued their road together as far as Herculaneum; and that the person with him, the deceased, took another road from the other person, and that they were to

meet again at a cross-road near Ste. Genevieve, about two miles from town; that the prisoner described the road or place of meeting to witness, and said he knew it because he had traveled that road before; that when the prisoner and the deceased got to the road or place of meeting, they stopped a short time and saw their companion coming down the road; that after a little conversation, they commenced quarreling; that after the deceased and the other man had quarreled a little while, they began to scuffle and fight; the other man took the club the prisoner had in his hand, and knocked the deceased down; and after the other man had knocked the deceased down, this third man (whose name was called Forbes by the prisoner) gave the prisoner the club, and told him if he did not strike the deceased, he would knock him down, and being thus forced into matters by threats, he then struck the deceased twice with the club. The body of Thompson, the deceased man, was then dragged into a gully. The witness then says, two or three days after he had the above conversation with the prisoner, the prisoner again told him the same story, with this difference, that he had struck the deceased with a cane and not with the club; and that the Englishman, Forbes (as he called him), told him that if he would knock Thompson, they would go to New Orleans together. The prisoner said he did not kill Thompson, that he only gave him two blows.

Sebastian Zeigler says, a few days after the prisoner had been in jail, the prisoner sent the sheriff to him to go and see him; he did so, in company with the sheriff; when he went, he found the prisoner crying; then the prisoner told him that some person through the grates told him he was to be hung to-morrow; and that he was in a bad fix, and wished he had not been with them men; and said there were three in company, to wit, John Bower (himself), George Thompson (the deceased), and Thomas Forbes; and that five of them had broken jail at St. Louis; that the three mentioned had traveled together as far as Herculanum; that Forbes then took the big road, and he and Thompson came to Fight's shot-tower, and then continued on down, when, after being separated two nights, the third morning they all came together again. The prisoner and Thompson came to the forks of the road, stopped about ten or fifteen minutes, looked up the big road, and saw Forbes coming. The prisoner then said, "if he only could live a little longer to save his soul, if he could not save his life." Then the prisoner confessed that they had killed the man, and said he was very sorry he was along; and said

after they left Madame Roussiere's, they stopped at the forks of the road, and that Forbes came down the road, and so they came together; the quarrel again commenced, having quarreled before, which was the cause they parted; that Thompson and Forbes had quarreled in the St. Louis jail, where Forbes drew a knife on Thompson; and that after a little quarreling at the forks of the road, Forbes took the stick out of prisoner's hand and knocked Thompson down, when the deceased jumped up and knocked the prisoner on the head, and cut the crown of his hat; then the prisoner took the small stick and gave the deceased two blows on the back, and no more; while prisoner was doing this, Forbes continued to strike Thompson till he was dead, and jumped on his breast with his heels after he was dead; that Forbes then took and dragged Thompson into the gully in the woods, and he went along with him; and while there, Forbes told prisoner they must change clothes, and they began to strip Thompson, he having the best pantaloons; Forbes tried to put on Thompson's pantaloons, but could not, he being a much larger man than Thompson; then the prisoner and Forbes changed pantaloons to keep from being known; Forbes then said he would take the road to Perryville, and he should take another, but he being lame could not travel far or fast; the prisoner told witness he wished Forbes might be caught, and said he could not be far off, as it was such cold weather; then prisoner gave a particular description of Forbes, which was minute; then asked witness if he would be hung, to which the witness replied, he must be tried first by a jury. The witness had several conversations with the prisoner, and the prisoner always told the same tale as to the facts; asked him for prayer and religious books, and cried a great deal.

Doctor Shaw, a witness, says he saw the dead man in the gully; helped to take him out; his skull was broken, also cut in the forehead, and the breast very much bruised. This was all the evidence given for the state, and the prisoner gave none.

It is contended by the prisoner's counsel, that the evidence is insufficient to sustain the verdict against the prisoner as to murder in the first degree. They, however, do not insist that there should have been a verdict of acquittal entirely, but that the confession made by the prisoner establishes the guilt in the second degree of murder only; and they insist that the jury must have erred in giving due weight to that part of the prisoner's confession which goes to show the prisoner was compelled to take part in the transaction by threats of Forbes. In order

to show what was the duty of the jury regarding this confession, they have cited several authors, which, if necessary, will be noticed hereafter. The indictment is founded on the first section of the second article of the statute respecting crimes—revised code, 167, and enacts that “every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or other felony, shall be deemed murder in the first degree.” The second section says, “all other kinds of murder at common law, not herein declared to be manslaughter or justifiable or excusable homicide, shall be deemed murder in the second degree.” The third section declares that “persons convicted of murder in the first degree, shall suffer death; and those convicted of murder in the second degree, shall be imprisoned in the penitentiary.”

The first section places all those murders which are done by means of poison or by lying in wait, in the first rank of the catalogue; it then declares that all other murders, where the killing is willful, deliberate, and premeditated, shall also stand in the first degree. These words furnish a general description of murders which are to be known by the description; and all those which answer the description are, when known by the description, to be placed in the first degree, as well as those embraced in the particular description. All those contained in the particular description, we know are not intended to be in the general description. These are the following: 1. Those committed by means of poison; 2. Those committed by lying in wait; 3. Those committed in the perpetration or attempt to commit arson; 4. Those committed in the perpetration or attempt to commit rape; 5. Those committed in the perpetration or attempt to commit robbery; 6. Those committed in the perpetration or attempt to perpetrate burglary; 7. Those committed in the perpetration or attempt to commit any other felony. Then the special cases end with a general description of other felony as to the attempt or perpetration of crimes. I understand that not only the six cases specially given are in the first degree, but that all the cases which occur or can be found, when the murderer is perpetrating or attempting to commit any manner of felony, are also in the first degree. There is no evidence in the case at bar that Bower's case comes within any of the specially enumerated cases.

To place his case, then, in the first degree, the murder must

have been willful, deliberate, and premeditated. All three of these things must concur, if, indeed, they do constitute three distinct ingredients. But I do not perceive how it can be so. I understand deliberate and premeditated are in this case about the same thing. I will, therefore, drop one of these words, and use the other as being sufficient. The statute says, the killing must be willful; by this I think the act means the murderer intended to kill. This supposes an actual condition of the mind in regard to the killing when the deed takes place. The other part of the description requires that the killing must have been thought of before the act of killing began to take place.

The legislature, therefore, say the killing must be premeditated. I therefore understand the description of murder, required to place it in the first degree, to be this: "that there must be a killing with an intent to kill and do the deed at the time the fact took place; and also that before the act took place, the murderer intended to do the deed." Before I compare the prisoner's case with the statute as above understood, I will remark that, as regards the cases put by the statute in the second degree of murder, they are all those which are not contained in the first section, and all of those not otherwise provided for by the act. I at first, when the argument began, thought there was nothing on which the statute (second section) could act. But I now think that there may be several classes of murder on which it can act. I will not now inquire whether the statute has placed all those murders, not in the first degree, on the footing of manslaughter, justifiable and excusable homicide, but will simply say, that there are several murders at common law, which do not come under the general description of the first degree. The first case is, where the unnatural mother exposed a child in an orchard, which was in consequence destroyed by a kite. The next is where the overseers of the poor neglected and refused to furnish food for a beggar, and he died. The third is, where a son wantonly exposed his sick father to the weather, so that he died. At common law, all these cases would be murder: See 4 Bl. Com. 197. Now, in all these cases, there is no supposition that the party exactly intended to commit the act of killing, yet because the consequence was death, the party was holden to be a murderer. These cases, therefore, and the like cases, are in my opinion, the cases which are within the second degree.

I will proceed to examine the case at bar, on the evidence, to see if the jury erred in finding the prisoner guilty of murder in the first degree. In the first place it is to be remembered there

must have been a murder. I do not doubt at all that, independent of the confession, the proof is entirely satisfactory that a murder was committed on the body of Thompson; and that that murder was of a willful and deliberate character, sufficient to rank it in the first degree. The proof is, that on the night preceding the homicide, the prisoner and the deceased stayed all night three miles from the spot where the homicide occurred; that though they appeared friendly while there, yet the prisoner (says the witness, Mrs. Roussiere), took with him in his hand a big stick; they were both walking; the prisoner was lame, and complained of his lameness while there. Now one might suppose the stick spoken of was intended to be used as a staff, but the witness says the stick was big; presently the prisoner and the deceased were met by a witness, who found them walking, Thompson before, the prisoner behind, with his stick under his arm. This took place near the scene of the murder. The fact that the prisoner did not use the stick as a walking-stick, and that he had it under his arm, does strongly indicate that the stick was not taken at first to be used as a walking-stick. Another witness says he saw the parties within two hundred yards of the spot where the dead body was found. The witnesses, as they came back with wood, found a trail across the road; followed the trail across the road, and in about twenty yards from the road, found a dead man in a gully, stripped of all his clothes except socks and shirt; they also saw the dead man had been beaten with a club, his skull mashed in, his breast bruised, and the hat of the prisoner and the club, which Bower was seen with just before, lying near the dead man; the cap and other clothes of Thompson were gone, and afterwards the cap of Thompson, the first time Bower was seen, was on his head, which was the same day about twelve or one o'clock; the prisoner then was found pursuing the back road which he had come, and at night was found at Dr. Kluke's, twelve or fourteen miles from the scene of the homicide; there he appeared alarmed and scared, and slept none; pretended he had been lost, yet, in two instances that day, he had means of inquiring the road to Kluke's, and did so inquire; he then was the next day found at the distance of seven miles from Kluke's at night; said he had been lost and lay out the night before; he might have been lost that day, but that he lay out the night before, we see by the testimony of Kluke, was entirely false; eight or ten days thereafter he was arrested. Here we find a man has been killed, and the question is, who did the deed?

Can anything be more clearly proved who did it, than the circumstances in this case do prove Bower did it? Yes, positive proof might be more satisfactory. Yet in my opinion, the jury risked nothing to consider the evidence sufficient. They might well suppose the stick, carried by the prisoner from Madame Roussiere's, was taken with the intention to kill Thompson, as it was not used for any purpose of convenience. This same stick was seen also under his arm, when within two hundred yards of the scene of the murder, and it was also found at the spot where the body was found. In the ordinary course of things, who could have done the deed with this stick other than Bower? Then we find Bower's hat there, the very hat seen on him two hours before within two hundred yards of the spot. Then the cap of the dead man was that same day seen on Bower's head. If Bower did not kill Thompson, how came the hat and stick there? This can not be accounted for on any principle other than by supposing that Bower killed Thompson with the stick, hid him, left his hat, and took Thomson's cap for the purpose of disguise, and being so disguised, perhaps safe in his opinion, he took the back track. There are many other circumstances to strengthen this opinion, such as pretending to be lost and lying out all night, his behavior at Kluge's, and the like. If the foregoing view of the evidence proves Bower committed the murder, it does, in my mind, also prove that the murder is of the first degree. If Bower did the act at all, the fact of the stick being carried three miles, and the evidence of bruises and the skull being mashed in, proves willfulness and premeditation, so that the case comes within the general description of those murders placed in the first degree. That the stick was used, the appearance of the body, the skull beat in, the breast and head bruised, abundantly prove this; that the killing with this stick was premeditated before the killing took place, is proved by the fact where the prisoner got the stick, how he carried it, etc.

But it is said, his confession being given in evidence, must be taken all together. This is the law. But it is also the law, that the jury may give credit to one part of the confession, and totally disregard the balance. This is not a new arbitrary power, but must be governed by rational legal principles. One of those principles is, that if that part of the confession which goes for the prisoner is against the experience of mankind, then it is of no weight. If it be contradicted by other evidence stronger than itself, then it has no weight. If the whole confession is contradictory to itself, then it is of no weight. If the facts proved by

a witness are totally or partially inconsistent with the whole transaction, or a material part thereof, then the same is of no value; and just so, if that part of the confession going for the prisoner is so, then its credit is nothing. If the statement of the prisoner is at different times different, the value of the whole is lessened.

If we try the confessions in this case by these rules, his confessions will not help him out. The case the prisoner makes out by his confessions, first to Van Voert and then to Zeigler, is, that himself, the deceased, and one Forbes, broke the St. Louis jail; in company they traveled to Herculeaneum; that Thompson and Forbes quarreled, and for that reason parted; that Forbes took one road and they another; that it was understood and agreed they should meet again at the forks of the road, where the killing took place; that after being parted two nights, the third day in the morning, Bower and Thompson came to the spot, and in about ten or fifteen minutes, Forbes came also. In the first place, this coincident meeting, though not impossible, is rather improbable. That as soon as Forbes came up, Thompson and himself began to quarrel, and a scuffle ensued between them. Then Bower tells Van Voert that Forbes took the club that he had in his hand, and therewith knocked Thompson down; and that after Forbes had done so, he (Forbes) gave the prisoner the club, and told him if he did not strike Thompson, that he would knock him (the prisoner) down, and being thus forced into matters by threats, he then struck the deceased twice with the club. The prisoner again told the same story, except that he said he struck the deceased with a cane and not the club, and said he did not kill Thompson. In regard to this confession, it undertakes to put Bower in a condition of necessity to strike Thompson twice.

It seems to me there is no truth in the pretense. The prisoner says Forbes took the club from him, knocked Thompson down, and then gave the club back to him, and then threatened to knock him down if he did not strike. In the first place Forbes had no club when the fight began; if he had, why take Bower's stick? Then he had none after he gave it back to Bower, and he was in no condition to knock Bower down; so that the pretense of duress is all a pretense, for Bower would hardly have given the deceased two blows with the club for fear of Forbes, when Forbes was unarmed and he himself was armed; I therefore conclude there is no truth in this part of the matter.

The next time the prisoner talked with Van Voert, he stated he

struck the deceased with a cane. This puts the club back in the hands of Forbes, and does away entirely with the duress; but gives as inducement to Bower to strike Thompson, that if he would do so, they would go to New Orleans together. The confession of the prisoner to Zeigler is, that when the quarreling had advanced, Forbes took the stick out of his hands and knocked the deceased down with it; that Thompson jumped up and knocked prisoner on the head, and cut the crown of his hat; then the prisoner took a small stick and gave the deceased two blows on the back and no more. This account of the fight is an improvement on the former account, for in this the prisoner had a good provocation to strike the deceased, and in the former there was no such thing, but duress at first and then a promise to travel together. In this case the stick is never returned to Bower, but while Bower was so striking Thompson, Forbes continued to beat him till dead, then stamped the dead man's breast with his heels; then goes on the confession about changing clothes.

It seems to me this confession can not be a true account of the matter; because, first, no such man as Forbes has been heard of. If such man had been found, that fact might have helped the prisoner some.

In the second place, the account is not entitled to credit, because if Bower were innocent, and one Forbes had committed the murder, as stated, when the two parted, if Bower were really innocent, he would have given information to the first person he could have found; he would have gone to Ste. Genevieve, only two miles off, which he knew according to his statement, for he says he had come the road before, and have made the matter known, so that Forbes might be caught. But instead of this, he puts on a disguise, took the back track, told lies, and wandered about.

I am well satisfied the jury did right to reject his confession entirely, and particularly that part which seeks to mitigate his crime.

Judgment affirmed.

TOMPKINS, J., concurring.

EDWARDS, J. dissenting. I do not concur with the other judges in the opinion just delivered in this case. By the law on which this indictment is founded, every murder committed, either, 1. By poison; 2. By lying in wait; 3. In committing arson; 4. Rape; 5. Robbery; 6. Burglary; and 7. In commit-

ting any other felony, shall be deemed murder in the first degree. The indictment under this act, for any one of these murders, must charge the particular manner of the killing; if by "poison," it must be so charged; if "by lying in wait," it must be so charged; if in attempting to "perpetrate arson," it must be so charged; and so of the other cases specially enumerated. The proof must correspond with the charges in the indictment, and the prosecutor must make that proof, and must show that the killing was done in the particular manner charged. If charged to have been done by "poison," the prosecutor must prove it to have been done by "poison;" if charged to have been done by "lying in wait," the prosecutor must prove it to have been done "by lying in wait;" and so of the other cases. The same section which declares these specially enumerated cases to be murder in the first degree, provides also, that every murder committed "by any other kind of willful, deliberate, and premeditated killing," shall be deemed murder in the first degree. For a murder of this character, the indictment must charge it to have been "willful, deliberate, and premeditated." The proof must here correspond with the charge also, and must show that it was "willful, deliberate, and premeditated." As when the indictment charges the murder to have been by "poison," it is necessary to prove it to have been done by poison; so, also, when the indictment charges it to have been "willful, deliberate, and premeditated," under the same law, it is necessary to prove that the killing was "willful, deliberate, and premeditated." The poisoning is a principal ingredient of one murder in the first degree, and it must be proved when charged; and the willfulness, deliberation, and premeditation, are principal ingredients of another murder of the first degree; and when charged, for the same reason, must be proved also. At common law, where the homicide is established, the law implies the malice, and the prosecutor is not bound to prove it; but the defendant must show the absence of malice, a thing as difficult for him to prove in many cases, where really there was no malice, as it would be for him to prove his innocence of the charge against him, in many cases, where he was really innocent; and a thing which is about as reasonable in the law to require him to prove, as it would be, if he were charged with murder, to require him to prove the murderer's innocence. But the common law does, in its thirst for vengeance, where there has been a killing (to use a strong expression), in some cases imply malice, where really no malice existed, rather than lose an occasional subject where malice did

exist. I think our law intended to remedy this hardship. In my view of this part of our statute, malice can not be implied, and the defendant is not bound to prove the absence of malice; but the prosecutor is bound to prove that the killing was "willful, deliberate, and premeditated." By the term "willful," it may be understood that the killing was designed, and not by accident; by "deliberate," that it was done after reflecting and weighing the matter well; by "premeditated," nearly the same thing, but a larger and greater degree of deliberation, or, rather, a determination beforehand to do the act. When the murder is not proved to be "willful, deliberate, and premeditated," it must fall within the second degree of that offense, unless it has been declared to be manslaughter, or excusable or justifiable homicide. The case before us was not one specially enumerated in the act referred to, but comes under the description of "willful, deliberate, and premeditated" killing; and as the killing was not proven to have been "willful, deliberate, and premeditated," in my understanding of the evidence, the defendant should have been found guilty, not of murder in the first, but of murder in the second degree, if the evidence was sufficient to justify that finding.

I am of opinion, therefore, that the judgment of the circuit court ought to be reversed, and that the cause ought to be remanded.

THE INTENT TO KILL IS THE ELEMENT that distinguishes murder in the first degree from murder in the second degree: *State v. Phillips*, 24 Mo. 489, citing the principal case. This whole subject-matter is treated of at length in the note to *Whiteford v. Commonwealth*, 18 Am. Dec. 774.

ARMSTRONG v. PREWITT.

[5 MISSOURI, 476.]

JUDGMENT AGAINST ONE OF THE OBLIGORS OF A SEVERAL BOND is no bar to an action against another, unless there has been a satisfaction or payment.

PARTY CAN NOT COMPLAIN OF ERROR unless it is to his prejudice, and if a defendant fails to give any evidence in support of his plea of payment, he can not complain that there has been no finding on the plea.

FINDING THAT THE PLAINTIFF OUGHT TO RECOVER, will operate as a finding that there has been an assignment of the bond sued upon, where the plaintiff sues in the character of assignee.

DEBT on bond. The opinion states the case.

J. Heard, for the plaintiff.

S. Kirtley, *contra*.

By Court, McGIRE, J. Prewitt, assignee, brought an action of debt by petition and summons. It appears by the record that Prewitt became the assignee of a bond from one White to him, made by the defendant and another person. The defendant pleaded that the other obligor was dead, and that White, before his assignment, had obtained judgment in the county court against the representative of the deceased obligor for the amount, and prayed judgment whether the plaintiff should have his action. The plaintiff demurred and had judgment; this is assigned for error.

It is a rule of law that a judgment on a several bond (as this bond was) against one obligor, is no bar against an action against the other, unless there is satisfaction or payment. In this case no such fact appears; therefore, the circuit court, on this point, committed no error.

The defendant also pleaded payment, and no assignment to the plaintiff by White. Issues were taken on both these pleas. The plaintiff then proved the assignment on the trial before the court without a jury. The defendant gave no evidence of payment to the court. The plaintiff did not read his bond to the court, and then the defendant prayed the court to nonsuit the plaintiff for want of evidence of indebtedness, which the court refused, but gave judgment for the plaintiff. But after the motion for a nonsuit was overruled, the plaintiff read to the court the bond and assignment without any objection being made by the defendant. The defendant supposes he was injured by the refusal to nonsuit the plaintiff. My opinion on this point is this, that the defendant had no right to demand a nonsuit for defective evidence. But if the evidence, in his opinion, were defective, yet, if the plaintiff chose to risk his case before the court, he might do so; and if the court found for him, the defendant could ask for a new trial, and if this were improperly refused, it would be error. But if this case were now a question of defective evidence, I would be of opinion the finding is well enough. There was no issue which made it necessary for the plaintiff to prove the bond was made by the defendant; this was admitted, and the debt also was admitted, and the bond was, by the law, already in the custody of the court. But one question made by the defendant was, whether or not Prewitt was entitled to the debt so admitted to be due by the bond. The record shows this fact was proved by a witness

in the presence of the court: nothing more on this point was wanting; so that if the plaintiff had not read his papers as he did, yet his case would have been with him. But he read his papers afterwards without objection being made. There is no error on this point.

But the plaintiff in error still insists the judgment is erroneous, because he says the court did not find his plea of payment one way or another. The finding is, that the plaintiff ought to have his debt, etc. Now suppose this is no good finding, as to the question of payment, yet the question is not whether there be error or no error in the record. But if there be error, yet something else is required. It must be such error as may prejudice the party. How can this man pretend he is injured by the failure of the court to pass on the plea of payment, when the record shows he gave no evidence on this point of any sort. There is then no error in this point. But as to the plea of no assignment, the only question made by that plea was, whether the assignment had been made or not. The court find the plaintiff ought to recover his debt. This can not, in any possible sense, be true, unless it be true the assignment was made; though his finding is somewhat argumentative, yet the argument is not far fetched; there can be but one way to look for the facts on which this conclusion arises. I think this case is entirely different in some particulars from the case of *Fenwick v. Logan*,¹ and of the case of *Snedicar v. Jones*.² There is then no error in this case.

The judgment, the other judges concurring herein, is affirmed with costs.

UNSATISFIED JUDGMENT AGAINST ONE OF SEVERAL for detention of property is no bar to a suit against another guilty of the same detention: *Elliot v. Porter*, 30 Am. Dec. 689; *Wright v. Lathrop*, 15 Id. 529. But a payment of one of two judgments obtained upon the same demand discharges both: *Sherwood v. Collier*, 24 Id. 264.

1. 1 Mo. 401.

2. *Jones v. Snedicar*, 3 Mo. 280.

CASES
IN THE
SUPERIOR COURT OF JUDICATURE
OF
NEW HAMPSHIRE.

FRENCH v. HALL.

[9 NEW HAMPSHIRE, 137.]

REGULARITY OF PROCEEDINGS BY WHICH PERSONAL PROPERTY IS ATTACHED and sold under execution, is to be determined by the laws of the state in which such proceedings are had.

VALIDITY OF SALE OF PERSONAL PROPERTY depends upon the laws of the government where it is made and the property delivered.

OPEN AND SUBSTANTIAL CHANGE OF POSSESSION IS NECESSARY to make a sale of personal property valid as against creditors.

GIVING BACK POSSESSION OF PERSONAL PROPERTY TO VENDOR, after a sale thereof, upon a hiring, and for a temporary purpose, does not render such sale fraudulent, where there has been a visible and substantial change of possession.

TROVER for a sulky, which it appeared from the evidence had formerly belonged to one Pope, of Bellows Falls in Vermont. In May, 1837, Pope sold it to the plaintiff at Keene, in this state, where the latter resides. The plaintiff, who is the keeper of a livery stable, paid the value of the sulky, repaired and used it for some time. In the latter part of the following month Pope hired it to go to Bellows Falls, and while it was there, the defendant, a deputy sheriff, attached and took it upon a writ against Pope, and afterwards sold it, as his property, under an execution. A verdict was taken for the plaintiff, by consent, subject to the opinion of this court. The other facts are stated in the opinion.

Kellogg and Wilson, for the defendant.

L. Chamberlain and Vose, for the plaintiff.

PARKER, C. J. It is undoubtedly true, that the regularity of the proceedings, by which the sulky was attached and sold as the property of Pope, is to be tried and determined by the laws of Vermont. The attachment and sale took place within that jurisdiction, the property being found there at the time. It was thus properly subject to the laws there existing; and even if the same course had not been there resorted to, in order to sell and apply the property in discharge of the debt, as would have been requisite to effect the same purpose here, we are not, for that cause, to hold the proceeding void, if the course adopted was one sanctioned by the laws of that government: *Story Conf. L. 321, 462; McRae v. Mattoon*, 13 Pick. 53. The process under which the defendant acted is to justify him here, for all acts for which it would be a justification in the courts of that state. "Whatever is a justification in the place where the thing is done, ought to be a justification where the case is tried:" *Mostyn v. Fabrigas*, Cow. 175. But the right of action is transitory: *Id.*; 1 Chit. Pl. 268, 273; *Glen v. Hodges*, 9 Johns. 67; *Rafael v. Verelst*, 2 W. Bl. 1058; *Gardner v. Thomas*, 14 Johns. 134 [7 Am. Dec. 445.]

But in this case no exception has been taken that the proceedings for the attachment and sale were not in due course, if the property could lawfully be seized, for the satisfaction of the debt against Pope, anywhere; but the plaintiff contends that this property was not the property of Pope, and not liable to be taken, in any jurisdiction, for the satisfaction of his debt—that he himself was the owner at the time, having purchased the property of Pope two or three months previous, and that no law of Vermont authorized the defendant to take his property, and apply it to the satisfaction of Pope's debts. The right to take depends upon the title to the property, and the question is one of property; for if the plaintiff is correct in the allegation that the sulky belonged to him, it is not suggested that any law of Vermont would justify the attachment and sale of it to pay the debt of another. Such a law, if it existed, would render it questionable whether comity ought longer to exist; for it would be little better than a legalized system of piracy. There is no such reproach resting upon the character of our sister state.

The question which we are called upon to determine is, who, upon the facts disclosed in this case, was the legal owner of the property in controversy, as against creditors, when it was seized by the defendant. If, as against creditors, it belonged to the plaintiff, his action is well sustained; but if it did not, the defense

must prevail, notwithstanding there had been such a contract, or sale, that Pope himself could not have withheld the sulky from the plaintiff. The attachment and return of the officer, and other proceedings, in Vermont, do not settle the right of property: *Bolt v. Burnell*, 11 Mass. 165; *Brown v. Davis*, 9 N. H. 76.

There is no question that the sulky once belonged to Pope, who then resided, and perhaps still resides, in Vermont; and this is *prima facie* evidence for the defendant; but the plaintiff undertook to show that about two months prior to the time when it was attached, he fairly and legally purchased it, and thus became entitled to maintain this action. He proved the contract of sale as alleged, the payment of a full consideration, the delivery of the property, and acts of ownership by him until Pope hired it of him, he being the keeper of a livery stable. The defendant does not deny that these things were done, but he contends this sale was void, as against creditors, by the laws of Vermont, and that he was therefore entitled to treat the sulky as the property of Pope, when he found it afterwards in Pope's possession; and he cites several authorities from the reports of that state, which he contends support his position.

If the sale of the sulky had taken place within the state of Vermont, then the validity of the sale, as well as the proceedings to attach and levy upon the property, must be tried by the laws there in force at the time the sale was made; and it may well be admitted that in such case the question, whether the sale was valid as against creditors there, should, of right, be tried by those laws, as well as the question, whether it was valid as between the parties to the sale. But the sale did not take place within the limits of that state, or within several miles of it. The contract of sale was made, the consideration paid, and the delivery perfected within this state; and the plaintiff held and used the property here for a considerable period afterwards; and upon what principle is it that the validity of this sale, thus made by the owner, within the limits of this state, is to be determined, for any purpose, by the laws of another state?

The plaintiff is a citizen of this state, and the purchase by him would appear to have been in the course of his ordinary business, he keeping horses and carriages to be let for hire. At least, the case shows that to be his occupation, and there is no evidence tending to show that the purchase was not so made. This is not a sale made by the owner, in the place of his domicile, of property situated in another jurisdiction. Nor is there any

evidence, upon which it could be left to a jury to find that Pope resorted to this state, to make a sale which was prohibited by the laws of Vermont, and with a view of evading those laws. The contract of sale might as well have been made there as here; and if it may be surmised that Pope sold because he was in debt, that, it is supposed, would not avoid the sale in either state, so long as there is no evidence that he did it to prevent an attachment; or if he did, that the plaintiff was at all conscious of any such intention. Nor is there anything else to bring the case within any exception to the general rule, that the validity of a contract, for the sale of personal property, must depend upon the laws of the government where the contract was made and executed, and the property delivered: Story Conf. L. 200, 317, etc. Nothing was done in Vermont, and nothing remained to be done there in order to complete the sale; nor was the sale injurious to the interests of that state; nor opposed to its policy; nor did it grow out of any illegal transaction; nor was it against morals or public rights.

The validity of the contract of sale, then, must be determined by the laws of this state; and would doubtless have been so determined, had this action been brought in the courts of Vermont; *Douglass v. Oldham*, 6 N. H. 150.

In determining this question, the subsequent conduct of the parties—the hiring by Pope—the possession of the property, within the limits of Vermont, by him, at the time of the attachment—and the permission of the plaintiff by which it thus went into his possession—may all be taken into the account, but only as they bear upon the question, whether the contract of sale was valid or void. If it was once valid, as against creditors, no subsequent possession by Pope, as a mere bailee, nor any taking of the property into the limits of another state, can render it void. It seems to be conceded, if the contract of sale is to be tried by the laws of this state, that there was a sufficient change of the possession, and that the sale must be held valid and the plaintiff's action sustained. If we rightly apprehend the law of Vermont, as gathered from the cases cited by the defendant's counsel, the result of a trial by that law must probably have been the same.

It seems to be supposed that there is a substantial difference in the rule relative to sales of personal property, as held in the two states; possession of personal property, after an absolute sale, in this state, being held to be, *prima facie*, and if unexplained, con-

clusive evidence of fraud; while in Vermont it is held to be fraud *per se*. The expressions in some of the cases, taken alone, might perhaps well lead to such a supposition; but the general current of the authorities seems to indicate, that the principle held in both may perhaps be substantially the same. There might, in that case, be some difference of opinion as to some of the applications which have been made of the principle.

The leading case in this state is *Coburn v. Pickering*, 3 N. H. 415 [14 Am. Dec. 375], in which it was held that "any trust attending a sale of chattels is a fraud with respect to creditors. And if the vendor of chattels retain possession after an absolute sale, this is always *prima facie*, and if unexplained, conclusive evidence of a secret trust." And further, that an agreement made after the sale, on the same day, that the vendor should retain possession, and pay rent to the vendee, was not a sufficient explanation. By the law of this state, therefore, in order to a valid sale as against creditors, there must be a change of possession; and doubtless an open, visible, and substantial change; or there must be some sufficient explanation why the property was left in the possession of the vendor. It is not said that the change must be actually known and notorious. What will constitute a sufficient explanation has never been fully settled; but its nature is, in some degree, indicated by the fact, that an agreement that the vendor might retain possession, under a lease, has been held not to be sufficient.

In this case, however, there was a change of possession, continuing about two months; and the courts of Vermont, although they hold that "a sale of personal property, unaccompanied with a change of possession, is *per se* fraudulent as against the creditors of the vendor," do not hold, where there has been a visible substantial change of the possession, that the sale is fraudulent, if the property is, afterwards, upon a hiring, suffered to go back into the possession of the vendor, for a temporary purpose: *Farnsworth v. Shephard*, 6 Vt. 521; *Morris v. Hyde*, 8 Id. 356; *Harding v. Janes*, 4 Id. 462.

From the opinion of Mr. Justice Prentiss, 2 Aik. 69, 70,¹ it seems there are exceptions to the rule as held in Vermont. Perhaps an impossibility of removal and change of possession, from whatever cause, might be held to constitute an exception. If what would be held here to be a sufficient explanation, would there negative the fraud and form an exception, the difference between the law, as held in the two states, is rather one of terms

1. *Weeks v. Wead*.

than of principles. However this may be, there must in this case be

Judgment for the plaintiff.

LAW OF PLACE WHERE PROPERTY IS SITUATE, when governs: See *Chapman v. Robertson*, 31 Am. Dec. 264, note 270, where other cases are collected.

TRANSFER OF CHATTELS UNACCOMPANIED BY CHANGE OF POSSESSION: See *Streeper v. Eckart*, 30 Am. Dec. 258, note 262, where the other cases in this series are collected. The principal case is cited in *Powers v. Green*, 14 Ill. 391, as a case in which a re-delivery upon a lease was sanctioned.

RICE v. CHASE.

[9 NEW HAMPSHIRE, 178.]

PARTY HAVING RIGHT OF ACTION AGAINST OFFICER FOR ATTACHING PROPERTY by law exempt from seizure, does not lose or waive such right by merely declaring to a third person that he did not care for the things taken by the sheriff, that the creditor might have them and welcome, but that he would take good care that he got no more, where no consideration was paid by the creditor or officer, and neither of them had, at the time, any knowledge that such declaration had been made; nor does it make any difference that the creditor afterwards heard of the declaration, and in consequence proceeded to sell the property attached, especially when such sale was made after the debtor brought his action.

TRESPASS, for taking sundry articles of bedding, household furniture, and clothing. Plea, the general issue, with notice of justification as deputy sheriff. The evidence showed that one Wood had caused a writ to be issued against the plaintiff, under which the defendant as deputy sheriff attached and took the articles mentioned in the declaration, which were all the goods he had at the time, and which he claimed to be exempt from attachment. Wood obtained a judgment at April term, 1836, and the defendant sold the property under execution in the November following. The defendant, to show that the plaintiff had waived his right of action, offered the testimony of one Stafford, to whom it was alleged that the plaintiff had stated in August, 1835, that he cared nothing about the things taken by the sheriff, that Wood might have them and welcome, but that he would take good care that Wood got no more, but that he would never pay Wood. The court rejected the evidence. The defendant then offered the testimony of one Nye, Wood's agent, that Wood informed him of what the plaintiff had said to Stafford, and that in consequence he had the property sold. This evidence was also rejected. The jury found for the plaintiff.

iff, and the defendant moved for a new trial on the ground of the rejection of this evidence. The writ in this case was dated December 26, 1835.

Leland, for the plaintiff.

Kimball, for the defendant.

PARKER, C. J. It appears in this case that the goods and chattels mentioned in the plaintiff's declaration were exempted by law from attachment and execution. There may be cases where the taking of property exempted by law, would furnish no ground for an action of trespass; and perhaps where a license to attach and a subsequent attachment in pursuance of that license, would not only justify the officer in attaching the goods, but also in selling them afterwards, notwithstanding the debtor might attempt to countermand the permission to attach after it was executed, and to regain the possession of the goods. But in this case, there is not only no evidence of any permission or license to the creditor or officer to make the attachment and take the goods, but there is no evidence of any declaration to any third person that he was willing that any such act should be done, or that the creditor should have the goods, or any other conversation upon the subject, before the attachment was made.

At the time of the taking by the defendant, therefore, it was clearly an act of trespass; and the question is, whether the subsequent declarations of the plaintiff, made to a third person, and offered to be proved in the case, can be given in evidence to change the character of this act from a trespass to a justifiable taking, or operate as a waiver of the right, then vested in the plaintiff, to maintain an action for such taking. The answer is plain. A mere loose declaration, made to a third person, without any consideration paid by the creditor or officer, and without any knowledge on their part at the time that such a declaration had been made, can not be construed to deprive the plaintiff of a right of action which had previously accrued to him for the trespass: *Tufts v. Hayes*, 5 N. H. 452.

But in this case it was further offered to be proved, that the creditor having received knowledge of this declaration, his agent acted upon it, and caused the goods to be sold. There are two answers to this. In the first place, the declaration of the plaintiff does not purport to be a license upon which the creditor or the defendant was to act; and doubtless was not so intended, but was designed to exhibit a feeling of independence on the part of the plaintiff, and as a mere assertion of his ability to sus-

tain himself, notwithstanding Wood had seized and might sell his property. And, secondly, it was made without any consideration, and long before the subsequent sale of the property, or any act done in consequence of such declaration, this action was commenced; which might well be regarded as a revocation of any license given without consideration, and not then acted on, even if any such had existed.

Judgment on the verdict.

SHAW v. SPOONER.

[9 NEW HAMPSHIRE, 197.]

CRIMINAL PROCESS CAN NOT BE USED TO COMPEL ONE TO DISCHARGE A CIVIL LIABILITY; AND A PROMISSORY NOTE PROCURED BY THE ILLEGAL USE OF SUCH PROCESS, IS VOID.

ILLEGALITY OF CONSIDERATION, NOTE WHEN VOID FOR.—Where any part of the consideration of a note consists of an agreement to discontinue a criminal prosecution, such note is void.

ASSUMPSIT on a promissory note payable to the plaintiffs. The defendant admitted the making of the note, but contended that it was illegally obtained, and void. The evidence showed that Shaw, who resides in Boston, came to this state with a requisition from the governor of Massachusetts for the delivery of the defendant, who was charged with the crime of obtaining goods by false pretenses; that Shaw obtained from the governor of this state an order for the delivery of the defendant to the agent of the state of Massachusetts. The defendant was thereupon arrested, and, while under arrest, an arrangement was made between him and Shaw by which the defendant paid one half the amount of the claims of Shaw and those whom he represented, and gave notes for the other half, and Shaw set the defendant at liberty, and told him that if he came to Boston the creditors would assist him in getting into business, and engage that no one should trouble him. The note in suit is one of those then given by the defendant. The court instructed the jury that, if the process by which the defendant was arrested was made use of to compel the procurement of this note, or if any part of the consideration thereof was an agreement to discontinue said process, the note was void. By agreement a verdict was taken for the defendant, subject to an exception to this instruction.

C. Ainsworth and Bartlett, for the plaintiffs.

Bell, and Goodall and Woods, for the defendant.

PARKER, C. J. We are of opinion that the instructions of the court to the jury were entirely correct. Certain individuals, in Massachusetts, who were creditors of the defendant, had made complaint, in that commonwealth, in substance, that the goods which they sold were obtained by him by false pretenses, and not in the ordinary course of fair mercantile dealing. Obtaining goods by false pretenses is, by the laws of that state, a crime; and the complaint was, or ought to have been, intended as a means of bringing the defendant to justice, and causing him to be punished for that crime; and not as a means by which the more effectually to enforce the collection of their debts. It was only upon the ground that a crime had been committed, which ought to be punished, that they obtained a requisition from the governor of Massachusetts, upon the executive of this state, for the arrest and delivery of the defendant; and it was only upon the same ground, that an order was made for that purpose, in compliance with that requisition. The governor of Massachusetts would not have issued such a requisition to enable the creditors to effect a better settlement with their debtor; nor would the governor of this state have issued an order for the arrest and delivery of the defendant to an officer of the commonwealth of Massachusetts, for any such purpose.

The course and duty of Shaw, the creditor, and agent, was, then, a very plain one. Having thus procured the arrest, he should have taken the defendant to Massachusetts, and have caused him to be there arraigned, and tried for the alleged offense. For no other purpose had he the right to arrest him in the manner in which it was done.

If, instead of this, he caused the defendant to be arrested, and made use of the process in any manner to compel the defendant to settle, or give the note now in suit, that was a use of the process wholly unauthorized by law, and the note thus procured is void: *Richardson v. Duncan*, 3 N. H. 508; Bull. N. P. 172; Com. Dig., Pleader, 2 W. 19. Indictments and handcuffs furnish very cogent reasons for settlements, when used for that purpose. Or if, having thus arrested the defendant, it formed any part of the consideration upon which the settlement was afterwards made, and the note given, that the process should be discontinued, and the defendant released from arrest, such consideration was illegal, and the note therefore void: *Plumer v. Smith*, 5 N. H. 553 [22 Am. Dec. 478]; *Hinds v. Chamberlain*, 6 Id. 229, and cases there cited.

It must be distinctly understood that it is wholly illegal to use

the criminal process of the state to extort money, or even compel the payment of debts. It was not provided for any such purpose. If a creditor is desirous of collecting a demand, lawfully due to him, the laws have provided remedies deemed by the legislature suitable and competent for that purpose. If, instead of a resort to such remedies, he attempts to pervert the criminal process of the state, and make it subservient to that object, he may, in thus depriving his debtor of his liberty, make himself liable to damages, and in some instances endanger his own: *Commonwealth v. Pease*, 16 Mass. 91.

Judgment for the defendant.

CONTRACTS, CONSIDERATION OF WHICH IS COMPOUNDING A PENALTY OF suppressing a criminal prosecution, are void: See *Town of Hinesburgh v. Sumner*, 31 Am. Dec. 599, note 500; *Clark v. Ricker*, 14 N. H. 48, and *Coburn v. Odell*, 30 Id. 553, both citing the principal case; also *Snyder v. Willey*, 33 Mich. 495, citing the principal case. The principal case is also cited in *Partridge v. Hood*, 120 Mass. 407, to the point that every act punishable by law is a crime and can not lawfully be made the subject of a private compromise, except so far as expressly authorized by statute: Distinguished in *Clark v. Pomeroy*, 12 Allen, 560.

CROUCH v. FOWLE.

[9 NEW HAMPSHIRE, 219.]

TERM "DEMISE" IN A LEASE IMPORTS COVENANT on the part of the lessor, of good right and title to make the lease, and for quiet enjoyment.

GENERAL IMPLIED COVENANTS ARE QUALIFIED and restrained by express covenants of a more limited character.

IMPLIED COVENANTS RELATING TO TITLE MAY BE RESTRAINED by express covenants relating to possession.

COVENANT IMPLIED FROM TERM "DEMISE" in a lease is restrained by a covenant that the lessor would not himself, nor should any person claiming under him, interrupt the possession of the lessee, during the term.

COVENANT. In the lease from the defendant to the plaintiff, for the breach of the covenants of which this action was brought, the defendant did "demise, lease, and to farm let" the land described in the declaration, with a covenant that the defendant, and his successors, should and would permit the plaintiff, his heirs, and assigns, quietly, peaceably, and uninterruptedly, to possess and enjoy the premises, during the term. The declaration averred that the defendant had not warranted or defended the possession, and had not, at the time of the execution of the lease, any right or title in the premises, or any power or right to lease the same; but that the town of Haverhill, being the

rightful owner of the premises, had, since the date of the lease, taken possession thereof, against the plaintiff. The defendant objected, that the lease, which was offered in evidence by the plaintiff, contained no covenant that he had authority to lease the land. There was a verdict for the plaintiff, and the defendant moved for a new trial.

Quincy, for the defendant.

Bell and Rogers, for the plaintiff.

PARKER, C. J. The lease in this case contains no covenant, in terms, that the defendant had good right and title to lease the premises; and the first question which arises is, whether, from the language contained in the lease, such a covenant is to be implied. It seems to have been long settled, that in conveyances in fee-simple, containing the words give, grant, etc., a covenant of warranty is implied in the word "give:" Perk., sec. 124; Co. Lit. 384 a, note 332; *Noke's case*, 4 Co. 80; Shep. Touch. 184; *Frost v. Raymond*, 2 Cai. 188 [2 Am. Dec. 228]; and that in a lease, the term "demise" imports a covenant on the part of the lessor of good right and title to make the lease, and for quiet enjoyment: 4 Co. 80; *Holden v. Taylor*, Hob. 12 a, and note; 1 Saund. 332, n. 2;¹ *Style v. Hearing*, Cro. Jac. 73; Com. Dig., Covenant, A, 4; *Merrill v. Frame*, 4 Taunt. 329; *Adams v. Gibney*, 6 Bing. 656; *Grannis v. Clark*, 8 Cow. 36.

These authorities seem to stand uncontradicted, and no ground suggests itself to us upon which we can overrule them. It may be that instances exist, in which grants and leases are made where the party is not in fact aware that such covenants were ever supposed to be attached to these terms, and in which he may thus be held to have undertaken beyond the scope of what he actually intended; but if this is so, it will be from his folly, or misfortune, in undertaking to give or demise beyond his title, without restricting his liability by the other language of the deed.

In general, this rule can impose no hardship, because it is also well settled that these general, implied covenants are qualified and restrained by any express covenants of a more limited character. Such covenants are inconsistent with the idea of a general, absolute covenant, extending beyond them, and importing more than they express—and are, therefore, very properly held to modify and restrain any implication from the general terms of the grant. Upon this the authorities seem to be uniform, both in relation to deeds and leases: 4 Co. 80; Cro. Eliz. 674;

1. *Pomfret v. Microft*, 1 Saund. 321.

Co. Lit. 384 a, note 332; Hob. 12, note; *Browning v. Wright*, 2 Bos. & Pul. 13, 26; 4 Taunt. 329;¹ *Kent v. Welch*, 7 Johns. 258 [5 Am. Dec. 266]; *Vanderkarr v. Vanderkarr*, 11 Id. 122; 8 Cow. 40;² *Gates v. Caldwell*, 7 Mass. 68; *Sumner v. Williams*, 8 Id. 201 [5 Am. Dec. 83.]

And general express covenants have been held to be restrained by other express covenants: *Nind v. Marshall*, 1 Brod. & B. 319; *Howell v. Richards*, 11 East, 633; *Barton v. Fitzgerald*, 15 Id. 530; 13 Bos. & Pul. 13;³ 8 Mass. 202. The parties having entered into express agreements, it can not be supposed that they intended, by any general language of the deed, anything inconsistent with those express covenants, or which might otherwise have implied an undertaking of a more enlarged character. The principle of these authorities has not been controverted in the argument; but a distinction has been attempted to be made between different classes of covenants, so that express covenants relating to possession may not be held to restrain implied covenants relating to title.

This distinction, however, seems not to be sustained by authority, and is inconsistent with the principle upon which the decisions have been based. Express covenants relating to possession may furnish quite as strong reasons against implying a covenant of title from the general language of the deed, as express covenants relating to the title itself. There could be no reason for a covenant that the party would not himself, nor should any person claiming under him, interrupt the possession of the lessee, if he had in a prior part of the deed covenanted that he had good title to make the lease, and that the lessee might quietly enjoy it against all persons—and the case in Coke shows that a covenant of this character has been held to be restrictive.

The next question is, whether there is any express covenant in this lease, which restrains and qualifies the covenant of title which would otherwise be implied from the demise itself. And here it is not denied that the covenant that Fowle and his successor in office, shall and will permit the lessee, and his heirs and assigns, quietly to enjoy the premises during the term, would be wholly unnecessary, if he had before covenanted that he had good title to make the lease, and that it is a covenant imposing a less obligation upon the lessor. It is of the same character, although somewhat more restricted in its operation, as that in the case in Coke. It must, therefore, be held to express the

1. *Merrill v. Frame*.

2. *Grannis v. Clark*.

3. *Browning v. Wright*, 2 Bos. & Pul. 13.

contract which these parties actually entered into, and to restrain any covenant which might otherwise be implied from the term "demise," in the lease.

Judgment for the defendant.

IMPLIED COVENANTS FOR TITLE, OTHER THAN STATUTORY.—Implied covenants, called also covenants in law, are those which the law implies or intends from the nature of the transaction, although they are not expressed by words in the instrument containing them. The nature of an implied covenant was very clearly stated by Chief Justice Tindal in the case of *Williams v. Burrell*, 1 C. B. 402, 429. In delivering the opinion of the court in that case, he said: "A covenant in law, properly speaking, is an agreement which the law infers or implies from the use of certain words having a known legal operation in the creation of an estate; so that, after having had their primary operation in creating the estate, the law gives them a secondary force, by implying an agreement on the part of the grantor to protect and preserve the estate so by those words already created; as, if a man by deed demise land for years, covenant lies upon the word 'demise,' which imports, or makes, a covenant in law for quiet enjoyment; or, if he grant land by feoffment, covenant will lie upon the word 'dedi:.'" See, also, Rawle on Cov. 457; 4 Kent Com. 474; 1 Wash. R. P. 326; 3 Id. 670; 3 Hill R. P. 564, 4th ed.; Platt on Cov. 40; Williams R. P. 445; Woodf. Land. & Ten. 158, 12th ed.; Co. Lit. 384 a, n. 332; Bac. Abr., tit. Covenant, B.

In order to comprehend how words used in a deed or lease came to have two meanings at the same time, that is, one which they expressed and another which the law implied from their use, it will be necessary to revert to the origin of our system of land tenures, and the modes of transferring lands from one person to another. Under the feudal system, every contract by which lands were transferred from one person to another was a contract mutually beneficial to transferror and transferee. It secured to the one protection and to the other faithful service. The lord, or grantor, engaged to defend his tenant, and to give him another fief of equal value in case of his being evicted: Co. Lit. 101 b; *Young v. Hargrave's Adm'r*, 7 Ohio, pt. 2, p. 63. And if the lord failed to perform his part of the contract, he forfeited his seignior or rights over the land granted by him: 1 Hallam's Middle Ages, 167. The protection guaranteed by the lord to his tenant or feoffee was considered to be so desirable, during those unsettled times, that many allodial owners of land surrendered their lands to lords, and received them back with all the benefits and burdens of the feudal tenure: Id. 163. By the feudal constitution, the vassal rendered homage to the lord from whom he received his fief, and the lord in return undertook to warrant and defend the enjoyment of the fief by the vassal to whom he had given it. Warranty and homage were reciprocal. And, originally, warranty was a simple incident of tenure, created without any express contract. The mere act of receiving the tenant's homage bound the lord to the reciprocal duty of warranty on his part. These principles of the feudal law were established long before the introduction of deeds as a mode of transferring real property. So that, when deeds came to be used for the purpose of authenticating the transfer of lands, whether they contained the technical word "*warrantizo*" or not, a warranty was implied from the use of the word "*dedi*," which was termed the word of feoffment: Rawle on Cov. 2. That is, before transfers came to be made by written instruments, the mere granting of a fief bound the giver to warranty. And when deeds

or charters came into use, the word "*dedi*," the essential word of enfeoffment, had added to its ordinary meaning all that was formerly implied by the act of enfeoffment under the feudal law.

This seems to be the way in which the covenant of warranty came to be implied in deeds. As early as the year 1276, the statute *de bigamis* declared what should be the force and effect of certain words in a deed. It says, c. 6, that deeds which contained the words *dedi et concessi tale tenementum*, without reserving homage, or without a clause containing warranty, and to be holden of the donors and their heirs by a certain service, should be construed so as to bind the donors and their heirs to warranty. This statute was regarded merely as declaratory of the common law: 2 Reeves' History of English Law, 54. And Coke, commenting on this statute, says: "Even if there be an express warranty in the deed, yet that taketh not away the warranty that is wrought by force of the word *dedi*, but the feoffee may take advantage either of the one or the other at his pleasure:" 2 Inst. 275. Now, prior to the statute of *quia emptores terrarum*, lands might be granted to be held of the grantor himself, or of the chief lord of the fee. In the former case, if the deed contained the word "*dedi*," then without any other warranty both the grantor and his heirs were bound to warranty. And in this case, the introduction of even an express warranty into the deed did not have the effect of limiting or restraining the operation of the implied warranty. But where the lands were granted to be held of the chief of the fee, no tenure subsisted between the grantor and grantee. Warranty did not, therefore, hold in such cases, because there was no tenure between the grantor and grantee to raise it. However, the grantor was supposed to be bound by his own gift, and therefore "give" imported a warranty to him. But this warranty was personal to the grantor and did not apply to his heirs. The language of the statute *de bigamis* on this point is as follows: "Where is contained *dedi et concessi*, to be holden of the chief lords of the fee or of others, and not of feoffors or of their heirs, reserving no service, without homage or without the aforesaid clause, their heirs shall not be bounden to warranty, notwithstanding the feoffor during his own life by force of his own gift, shall be bound to warrant." Mr. Rawle, in his work on covenants, page 3, says this clause of the statute modified the common law on this subject. The statute *quia emptores terrarum* abolished the subinfeudation of fee simple estates, and as a consequence did away with the warranty theretofore incident to grants of lands in fee simple, to be held of the grantor and his heirs. As a consequence, the word *dedi* in a conveyance in fee thenceforth implied a warranty during the life of the donor, but no longer: Rawle on Cov. 5; Co. Lit. 384 a, n. 332; 2 Bl. Com. 300; 3 Wash. R. P. 671; *Frost v. Raymond*, 2 Am. Dec. 233; *Kent v. Welch*, 5 Id. 266. But where any reversion was left, by the conveyance, in the donor, the implied warranty still subsisted, because the donee still held of the donor, as before the statute, and in such cases the warranty bound both the donor and his heirs. And therefore, "if a man make a gift in taile, or a lease for life of land, by deed or without deed, reserving a rent, or of a rent service by deed, this is a warrantie in law, and the donee or lessee being impleaded, shall vouch and recover in value. And this warrantie in law extendeth not only against the donor or lessor, and his heires, but also against his assignees of the reversion; and so likewise the assignee of lessee for life shall take benefit of this warrantie in law:" Co. Lit. 384 b. After the statute *quia emptores* abolished the tenure upon which implied warranty depended, express warranties were introduced into deeds much more generally than had been the case before the enactment of that statute: Rawle on Cov. 5. This

was the state of the law in reference to implied warranties in deeds of conveyance of freehold estates, until it was changed by modern statutes in England and in most of the states in this country.

IMPLIED COVENANTS IN LEASES FOR YEARS.—A lease for years is merely a contract for the possession and profits of land, and a recompense therefor by rent or other consideration: Bac. Abr., tit. Leases and Terms for Years; 4 Kent Com. 85; Co. Lit. 384 a, n. 332. The tenant had only the perception of the profits, and was considered to hold the possession for the reversioner. He was regarded rather as the servant of the lord than as an owner in his own right. Not being considered as having the possession, he had, originally, no means by which he could recover it. His only remedy, on being deprived of the possession, was in consequence of the contract contained in his lease. The words "yielding and paying" in this contract were construed as a covenant in favor of the lord, upon which he could recover his rent by an action of covenant or debt; and the words "grant, demise," etc., were construed as a covenant in favor of the tenant, upon breach of which he might recover damages for the loss of his possession. This warranty differed from that in cases of freehold estates in this, that the latter arose from tenure, the former from contract. And, as this warranty arose from the contract of the parties, it was held to be modified and controlled by any express covenant inserted by them in the lease. It will be seen that, although the same term is applied to each of these things, the warranty in the one case is different, both in nature and effect, from the warranty so called in the other: *Young v. Hargrave's Adm'r*, 7 Ohio, pt. 2, p. 63; Co. Lit. 384 a, n. 332.

IMPLIED WARRANTY IN CASES OF EXCHANGE AND PARTITION.—A warranty was implied, in case of exchange of lands, from the word *excambium*, but from no other. And in the case of a partition at common law a warranty was implied from the partition itself: Rawle on Cov. 457, 473; Williams R. P. 445.

WORDS FROM WHICH COVENANTS FOR TITLE ARE IMPLIED.—In the conveyance of estates of freehold the only word from which a warranty of title can be implied is the word of feoffment, "*dedi.*" Rawle on Cov. 457; Co. Lit. 384 a; *Frost v. Raymond*, 2 Cai. 188; S. C., 2 Am. Dec. 228; *Young v. Hargrave's Adm'r*, 7 Ohio, pt. 2, p. 63; *Black v. Gilmore*, 9 Leigh, 446; *Allen v. Sayward*, 5 Greenl. 227; S. C., 17 Am. Dec. 221; *Gee v. Pharr*, 5 Ala. 586; *Rickets v. Dickens*, 1 Murph. 343; S. C., 4 Am. Dec. 555; *Kent v. Welch*, 7 Johns. 258; S. C., 5 Am. Dec. 266; Platt on Cov. 47; 3 Wash. R. P. 671; *Dow v. Lewis*, 4 Gray, 468, 473; 4 Kent Com. 474; Williams R. P. 443.

Covenants for title were, from the earliest times, implied from the words of leasing, "such as *demisi, concessi*, or the like:" Rawle on Cov. 461; *Merrill v. Frame*, 4 Taunt. 329; *Baier v. Harris*, 9 Ad. & EL 532; *Williams v. Burrell*, 1 C. B. 402; *Line v. Stephenson*, 5 Bing. (N. C.) 183; *Mostyn v. West Mostyn Coal and Iron Co.*, L. R., 1 C. P. D. 145, 152; Woodf. Land. and Ten. 158; Platt on Cov. 46; 2 Platt on Leases, 285; *Barney v. Keith*, 4 Wend. 502; *Grannis v. Clark*, 8 Cow. 36; *Tone v. Brace*, 11 Paige, 566; *Vernam v. Smith*, 15 N. Y. 327; *Burr v. Stenton*, 43 N. Y. 462; 1 Wash. R. P. 325; *Black v. Gilmore*, 9 Leigh, 448; *Maeler v. City of Carondelet*, 28 Mo. 112, 115; *Knapp v. Marlboro*, 29 Vt. 282; *Maule v. Ashmead*, 20 Pa. St. 482; *Dexter v. Manley*, 4 Cush. 14. In the case of *Lovering v. Lovering*, 13 N. H. 513, it was decided that the words "let and lease," do not make an implied covenant. But in the cases above cited the words, grant, demise, lease, rent, and the like, words of leasing, were held to raise implied covenants. In the case of *Mostyn v. West Mostyn Coal and Iron Co.*, L. R., 1 C. P. D.

152, Brett, J., in delivering his opinion, said: "The case of *Hart v. Windsor* is an authority that the word 'let' has the same effect in this respect as the word 'demise,' and that any other equivalent word would have the same effect."

THE COVENANTS FOR TITLE IMPLIED from the words of leasing are: 1. That the lessor has the power to demise; 2. A covenant for quiet enjoyment: Rawle on Cov. 464; *Line v. Stephenson*, 5 Bing. (N. C.) 183; *Mostyn v. West Mostyn Coal and Iron Co.*, L. R., 1 C. P. D. 145; *Wade v. Halkigan*, 16 Ill. 507; *Streeter v. Streeter*, 43 Id. 155; *Mayor v. Mabie*, 13 N. Y. 151; *Duff v. Wilson*, 69 Pa. St. 316; 1 Wash. R. P. 325.

IN A DEMISE BY PAROL a covenant for quiet enjoyment is implied by law, but not a covenant for good title: Rawle on Cov. 464; *Bandy v. Cartwright*, 8 Exch. 913; *Maule v. Ashmead*, 20 Pa. St. 482; *Gano v. Vanderveer*, 34 N. J. Law, 293.

EXTENT OF COVENANT IMPLIED IN LEASE.—An implied covenant ceases with the estate of the lessor, and does not necessarily continue during the whole term expressed in the lease: Woodf. Land. and Ten. 158; *Adams v. Gibney*, 6 Bing. 656. "Because the covenant in law ends and determines with the interest of the lessor:" *Swan v. Stransham*, Dyer, 257 a; Rawle on Cov. 469; *McClowry v. Croghan's Adm'r*, 1 Grant Cas. 307; Taylor on Land. and Ten., sec. 256. There is no implied warranty on a lease of house, or of land, that it is, or shall be, reasonably fit for habitation or cultivation. The implied contract relates only to the estate, not to the condition of the property: *Hart v. Windsor*, 12 Mee. & W. 68; 2 Platt on Leases, 286; Woodf. Land. and Ten. 159; *Carson v. Godley*, 26 Pa. St. 111. But there is an exception to this rule in the case of a furnished house. There is an implied condition in a lease of a furnished house that it is fit to live in: *Wilson v. Finch Hatton*, L. R., 2 Exch. Div. 336; *Smith v. Marrable*, 11 Mee. & W. 5; Woodf. Land. and Ten. 159.

NO COVENANTS FOR TITLE ARE IMPLIED IN THE ASSIGNMENT of a lease: Rawle on Cov. 463; *Landydale v. Cheyney*, Cro. Eliz. 157; *Waldo v. Hall*, 14 Mass. 486; *Blair v. Rankin*, 11 Mo. 440. Scott, J., delivering the opinion of the court, in the case last cited, says: "Although the word grant or demise, will in a lease create an implied covenant against the lessor; yet it is nowhere said that the same words will in an assignment create an implied covenant against the assignor. The object and intent of the parties in making an assignment is to put the assignee in the place of the lessee, and when that is done, the assignor ceases to have any further concern with the contract unless he has bound himself by express covenants."

Implied covenants do not extend to a thing not *in esse* at the time of the demise: Platt on Cov. 45; *Huddy v. Fisher*, 1 Leon. 278.

GENERAL IMPLIED COVENANTS IN LEASES are restrained and qualified by express covenants contained in the same instrument, on the principal that *expressum facit tacitum cessare*: Platt on Cov. 45; Rawle on Cov. 463; *Nokes' case*, 4 Co. 81; *Merrill v. Frame*, 4 Taunt. 329; *Line v. Stephenson*, 5 Bing. (N. C.) 183; *Brown v. Tomlinson*, 2 Greene (Iowa), 527; *Roebuck v. Dupuy*, 2 Ala. 535; *Blair v. Hardin*, 1 A. K. Marsh. 231; *Morris v. Harris*, 9 Gill, 19; *Vanderkarr v. Vanderkarr*, 11 Johns. 122; *Kent v. Welch*, 5 Am. Dec. 266; 3 Wash. R. P. 671; *Weems v. McCaughan*, 7 Smed. & M. 422; *Alexander v. Schreiber*, 10 Mo. 460.

OLCOTT v. LITTLE.

[9 NEW HAMPSHIRE, 259.]

PROMISSORY NOTE SIGNED BY ONE FOR HIMSELF AND ANOTHER, may be declared on as the note of both, provided authority to execute the note is shown.

UNSATISFIED JUDGMENT AGAINST ONE OF TWO JOINT DEBTORS, does not bar a subsequent action against the other where the latter was, at the time when the first suit was brought, without the jurisdiction of the state.

ASSUMPSIT against the defendant, as surviving promisor of one William Slyfield. The following is a copy of the note declared on:

"Value received of Mills Olcott, we promise to pay him, or his order, two hundred nineteen dollars twenty cents, on demand, with interest.

WILLIAM SLYFIELD,

"12th December, 1828. for himself and George Little."

This note was admitted in evidence against the defendant's objection. The defendant then offered in evidence a judgment of the superior court in favor of Olcott against Slyfield, upon the same subject-matter contained in the declaration in this case. The suit in which said judgment was rendered was commenced against Slyfield and Little, and the writ was returned, as to Little, *non inventus*. Slyfield died after this judgment was rendered, and before the commencement of the present suit. The court instructed the jury that the former judgment against Slyfield was no bar to the suit against Little. There was a verdict for the plaintiff, and the defendant moved to set it aside, and for a new trial, on the ground of misdirection.

Bell, for the plaintiff.

Bellows and Bartlett, for the defendant.

UPHAM, J. The first count in the declaration alleges that the note described in the same was made by Little and Slyfield; and it is contended that the note produced in evidence does not sustain that count.

All that is necessary in a signature to a bill or note, is that it imports to bind at all events, each person who signs it: Bayl. on Bills, 24; *N. E. Marine Ins. Co. v. De Wolf*, 8 Pick. 56. In this case the signature clearly imports to bind both Slyfield and Little, and may be declared on as a note made by them, provided authority is shown to execute the note. In *Smith v. Jarves*, 2 Ld. Raym. 1484, the declaration upon a note drawn by Jarves & Bailey stated that Jarves, for himself and partner,

made his note in writing with his own hand subscribed, whereby he promised for himself and partner to pay. It was objected on demurrer, that it was not charged that Jarves had signed the note for himself and Bailey; but the court held it sufficiently evident that Jarves did sign for himself and Bailey, and gave judgment for the plaintiff.

It is further contended, that a right of suit is lost by a previous judgment on this demand against Slyfield. This may be so in some instances. It is a well-settled rule, that in actions for the breach of a contract, whether in assumpsit, covenant, debt, or case, a verdict or judgment can not generally be given in a joint action against one defendant without the other: 1 Chit. Pl. 31; 1 Bos. & Pul. 73,¹ 12 East, 93;² and it is said that where three contract jointly and separately, and the plaintiff sues two, without objection to judgment, he can not afterwards sue the other, having elected to consider the agreement a joint one: Hammond on Parties to Actions, 230; also, that if judgment is obtained against one of two or more persons, jointly liable in a separate action against him on said contract, the plaintiff can not afterwards proceed against the parties omitted, but must lose their security: 1 Chit. Pl. 29; 4 Com. Dig., Action, K, 4; *Ward v. Johnson et al.*, 13 Mass. 148. But these cases are all subject to exceptions wherever the necessity of the case requires a separate suit to be brought. In the present instance a sufficient excuse appears for the several character of the action heretofore brought against Slyfield, so as clearly not to manifest an election to proceed against him, to the discharge of the present defendant. This excuse arises from the fact that but one of the defendants was within the jurisdiction of the government when the first suit was brought.

In *Tuppan v. Bruen*, 5 Mass. 193, it is said "to have been an immemorial practice in the service of a writ sued on a contract against two or more defendants, if some of the defendants are without the jurisdiction of the commonwealth, so that their bodies can not be arrested, and they have no usual place of abode within the state at which summons may be left, to cause the writ to be served on the defendants within the state only, and to proceed against them for the breach of the contract by all the defendants; and this practice is declared to be exceedingly convenient, from the frequency of the circumstance that joint debtors have been found to live in different states; and that, besides, it is said no injustice is done, because if judgment

1. *Scott v. Goodain*.

2. *Mass v. Roberts*.

had been rendered against all the debtors, the plaintiff might have satisfied it out of the defendants against whom, in fact, it was recovered."

This doctrine is also holden in *Dennett et al. v. Chick et al.*, 2 Greenl. 191 [11 Am. Dec. 59], in Maine; and has long been practiced in this state, and may be regarded as settled here.

Judgment, therefore, having been from necessity rendered against one of the joint signers only in the former suit, it stands in the same situation as where judgment has been rendered in a suit against one signer, where the contract was joint and several; which while it remains unsatisfied, clearly forms no bar to a suit against the other signer.

Judgment for the plaintiff.

MERE UNSATISFIED JUDGMENT AGAINST ONE OF SEVERAL, for detention of property, is no bar to a suit against another guilty of the same or a different detention of the same thing: *Elliot v. Porter*, 30 Am. Dec. 689.

INDORSEMENT BY ONE JOINT PROMISEE OF A NEGOTIABLE BILL for himself and his copromisee, without special authority, transfers no title to the note: *Lowell v. Reding*, 23 Am. Dec. 545.

NOTE GIVEN BY ONE OF TWO JOINT OWNERS of a vessel, who was also the master, for supplies for the vessel, in his own and the other owner's name, but without the latter's authority, is void as to him; but both owners are liable to the promisee on the general counts: *Wilkins v. Reed*, 19 Am. Dec. 211.

LUEY v. BUNDY.

[9 NEW HAMPSHIRE, 298.]

PROPERTY DELIVERED IN PART EXECUTION OF A CONTRACT which is void by the statute of frauds, may be recovered back, when the other party refuses to perform his part of the contract.

CONDITIONAL DELIVERY OF PROPERTY TO VENDEE, in case of a sale upon a condition, does not vest the property in him until he performs the condition.

PARTY MAY RESCIND ENTIRE CONTRACT after partial execution thereof, where the other party refuses to complete it, if the latter may be put in the same situation as before.

TROVER for certain promissory notes. The jury found a verdict for the plaintiff, after making the deduction mentioned in the opinion, and the defendant moves to set the verdict aside. The other facts are sufficiently stated in the opinion.

Cooper, for the defendant.

Fletcher and Young, for the plaintiff.

WILCOX, J. It must be considered as established by the ver-

dict in this case, that the notes, for the conversion of which this suit is brought, were delivered to the defendant on the condition that he should procure and deliver to the plaintiff, in exchange therefor, certain notes executed by one Gilkey, and should also execute to the plaintiff his own note for two hundred dollars, and secure the same by mortgage of real estate. A portion of the Gilkey notes and a sum of money were received by the plaintiff. But when the defendant was called upon to complete the contract, he refused altogether to give his own note for two hundred dollars, and to secure the same by mortgage.

The whole matter resting in parol, it is clear the promise of the defendant to execute a mortgage of real estate is within the statute of frauds, and void, and no action can be maintained thereon. The defendant thus having it in his power to avoid his contract, so that the plaintiff can have no remedy upon it, it seems just that he should be entitled to recover back whatever he has paid or delivered in part execution of the contract, and that the defendant should not be permitted to protect himself by setting up a contract, which he has rescinded. The right of the party to recover in such case is too well established to be drawn in question at this day: *Lane v. Shackford*, 5 N. H. 133; *Gillet v. Maynard*, 5 Johns. 85 [4 Am. Dec. 329]; *Clough v. Hosford*, 6 N. H. 231.

A sale of property may be upon condition that the vendee shall give security, or do some other act; and a delivery of the property, if also conditional, does not vest the property in the vendee — but upon non-performance of the condition the vendor may reclaim it. Such condition may be waived by the parties; but a delivery, without anything being said as to the condition, is not necessarily absolute. It is evidence of a waiver; and, in connection with other circumstances, may be sufficient to authorize a jury to find a waiver of the condition. But if, under all the circumstances, it is apparent that the parties did not intend to dispense with the condition, the property does not pass: *Hussey v. Thornton*, 4 Mass. 405 [3 Am. Dec. 224]; *Whitwell et al. v. Vincent*, 4 Pick. 449 [16 Am. Dec. 355]; *Smith v. Dennie*, 6 Id. 262 [17 Am. Dec. 368]; 2 Kent Com. 496, 2d ed.

In the present case it is found, that the notes were delivered by the plaintiff on condition that the other notes should be returned in exchange. When a part of the Gilkey notes, and the defendant's notes to Hanson, were received by the plaintiff, it was expressly declared that they were to remain as security till the whole contract should be performed. There is nothing

stated in the case from which an intention to dispense with this condition can be properly inferred. And we are inclined to the opinion, that the plaintiff is entitled to recover, on the ground that the contract has been rescinded by the acts of the parties. Where money is paid on a contract, which is executory on the part of him who receives the money, and he altogether fails to fulfill his part of the contract, the injured party has an election either to bring an action on the contract to recover damages for the non-performance, or to consider the contract as rescinded, and recover back the money paid, as had and received to his use: 1 N. H. 18;¹ 3 Id. 79;² 1 Pick. 57;³ 2 Burr. 1010;⁴ 7 T. R. 181;⁵ 12 Johns. 363.⁶ It is well established, however, that after a partial execution of an entire contract, it is too late to rescind it; and all remedy for any subsequent neglect must be had on the contract, and on that only: *Hunt v. Silk*, 5 East, 449; *Stevens v. Cushing*, 1 N. H. 17 [8 Am. Dec. 27].

This exception would not seem applicable to a case where, notwithstanding the partial performance, the defendant might be put in the same situation as before. Such a case would demand the application of the ordinary rule, that if the defendant has failed altogether to perform an essential part of an entire contract, the plaintiff may restore what he has received; and, for the sake of the remedy, treat the contract as rescinded. The defendant sustains no damage, nor does the plaintiff receive benefit from the partial execution of the contract. Nor is the defendant injured by the rescinding of the contract. In that event he becomes liable to the injured party only for the value of the property which he has received of him; while in an action upon the contract he might not only be held for the value of the property, but mulcted in damages for the non-performance of his agreement.

Where the plaintiff, in purchasing an annuity, had several assurances, part of which were vacated, held he might recover back the money paid, as he contracted for the entirety: 6 East, 241;¹ *Giles v. Edwards*, 7 T. R. 181.

In the case before us, the notes and money received were tendered to the defendant. If the plaintiff has derived any benefit from the use of the money, the value of that is fixed by law; and he might, under some circumstances, be bound to tender the interest. It was unnecessary for the plaintiff to produce the notes and money in court. He had offered them to the de-

1. *Stevens v. Cushing*.2. *Goodrich v. Laffin*.6. *Wheeler v. Board*.4. *Moses v. Macferlan*.2. *Danforth v. Ducey*.5. *Giles v. Edwards*.7. *Scarfild v. Gowland*.

fendant, who refused to receive them. The plaintiff had rescinded the contract—the notes and money became the property of the defendant, and he has his action to recover them, if wrongfully withheld from him.

That the amount of the money and Gilkey notes was deducted from the value of the plaintiff's notes, is no cause of complaint to the defendant. It is difficult to perceive how a set-off could be made in this suit of one claim against the other. But if such deduction was improperly made, without the assent of the defendant, it will constitute no bar to his right to recover their value in a separate action. The plaintiff is the only person liable to be injured by such a procedure; and for this cause the verdict on his motion might be set aside. But if he is content, we see not why the defendant should be heard to object.

That the plaintiff's notes had been destroyed does not affect his right to rescind the contract. That act appears to have been wholly unauthorized by the plaintiff, nor is there any evidence that it was even known to him.

Judgment on the verdict.

CONDITIONAL DELIVERY DOES NOT VEST TITLE IN VENDEE until the condition is performed: *Hussey v. Thornton*, 3 Am. Dec. 224. In the case of *Cogill v. Hartford & N. H. R. R.*, 3 Gray, 550, the principal case is cited in support of the proposition, that it is the duty of the purchaser to inquire and see that his vendor has a good title to the personal property which he undertakes to sell.

PARSONS v. PARSONS.

[9 NEW HAMPSHIRE, 309.]

ALIMONY MEANS, IN THIS STATE, THE PROVISION or allowance made to the wife upon a divorce.

HUSBAND'S POWER OVER WIFE'S PROPERTY ACQUIRED BY DESCENT.—Property which comes to a wife by descent does not vest absolutely in the husband. He may make it absolutely his own by reducing it to possession, and may release or assign it for a valuable consideration by a deed to which she is not a party; but, until he reduces it to possession, or in some way bars her right, he has only a qualified interest in it, and if he dies first the right survives to her.

ADMINISTRATOR IS A TRUSTEE FOR THE HEIRS, and this court, sitting as a court of chancery, has jurisdiction, in a proper case, to enforce their rights against him.

COURT OF CHANCERY IN ENGLAND DECREES SUITABLE MAINTENANCE to a wife out of her equitable interests, in case of desertion or ill-treatment by the husband. This jurisdiction is not, however, maintained upon the ground merely of a trust which the court has a right to enforce, but

is a separate branch of equity, and seems originally to have been exercised only where the husband sought the aid of a court of chancery to gain possession of his wife's property.

STATUTE CONFERRING CHANCERY POWERS IN CASES OF TRUST, upon this court, does not empower it, upon the application of a wife, to decree to her a maintenance out of her equitable property where she has been deserted by her husband. But if the husband or his assignee seeks the aid of the court to obtain possession of the wife's property, it may, perhaps, require him to make provision for her support before it will aid him in recovering it.

BILL in chancery, brought by Frances Parsons, by her next friend, John Smith, against George H. Parsons and John Gilman. The bill alleged that complainant and defendant Parsons married in 1826, and lived together until 1831, when he being embarrassed with debt absconded, leaving her and one son, a child of said marriage, wholly unprovided for, and without informing her of his whereabouts for over three years; that during said absence she and her child lived in the family of her father until September, 1835, when her father died intestate, leaving considerable real and personal estate, the said John Smith, the said Frances, and two other daughters being his children and heirs at law; that her father had intended to settle the portion of the estate that might fall to the plaintiff in such manner as to secure it for her sole and separate use; that owing to various circumstances, among which was the fact that he had no positive knowledge that said George H. Parsons was still living, he omitted to do so; that she has always been a dutiful, faithful, and affectionate wife; that no property has been settled or secured to her separate use by her husband, and that she has no other provision for her future support except her share in her father's estate; that in October, 1835, said G. H. Parsons opened a correspondence with her, and afterwards returned and lived with her nine or ten months, during which time he obtained from the administrator of her father, of her share of the estate, one thousand dollars, or more, and became and was very improvident and intemperate, thereby wasting his property; that thereupon she requested him to settle upon her, for the support of herself and children, the remnant of her property in his hands, which he had received of her portion. The bill then charged that said George H., combining with said Gilman, withdrew to a distant place, and there Gilman, who well knew the premises, obtained from him a pretended deed in fee of all his right and interest in certain real estate therein described, including in fact all the real estate of her father, which deed he had caused to be

recorded; that Gilman sets up a purchase from said George H. of all her share in her father's real and personal estate, and that he has given him deeds thereof, under which he has entered and claimed possession of her father's mansion house, and claims of the administrator the residue of her said share of personal estate, and possession of her share of the real estate for his own use, and threatens to sue therefor; that some days before any conveyance to Gilman, said George H. had notoriously separated himself from her, intending to desert her without providing for her support, whereof Gilman had notice or reasonable grounds of belief; that said George H. has since deserted her and their said child, without providing for their support; that all the conveyances to Gilman, if not obtained by fraud and imposition practiced on him, were made to defraud her of her rights and interest in her father's estate, and of alimony or support from her husband, and were voluntary and without valuable or adequate consideration, and in trust for said George H., to screen said goods from her claims; that if any consideration was paid it was merely colorable. The bill insisted that all such deeds of said George H. should be adjudged fraudulent and void, and that the property pretended to be conveyed by them be taken to be part of her share in her father's estate, upon which she has a legal and equitable lien for a suitable and adequate settlement for herself and children, which no act of her husband could defeat or impair. The bill prayed a discovery from Gilman; that said deeds of assignment to Gilman be delivered up and canceled; that alimony, maintenance, and support be decreed to her from the estate of said George H. Parsons; and that an account be taken. Upon a motion for an order of notice to the defendant, Parsons, a question arose respecting the jurisdiction of the court, and its right to grant relief upon the case stated in the bill.

Freeman and Goodrich, for the plaintiff.

Furrar, for Gilman.

PARKER, C. J. It is contended, in the argument, that the jurisdiction of this court is most ample in all causes of marriage, divorce, and alimony, the constitution giving all the powers which might be exercised by any of the ecclesiastical courts, courts of chancery, or any tribunal whatever in England; and it is said that this bill may be sustained upon the ground of a claim for alimony, which is alleged to be the wife's maintenance

during her marriage, and not some provision made for her upon, or after, a dissolution of it.

The term alimony, as generally used in the English books, means a portion or sum allotted to the wife for her maintenance, from year to year, either during a matrimonial suit, or upon a divorce: 1 Bl. Com. 441; *Cooke v. Cooke*, 2 Ph. Ecc. 40; *Street v. Street*, 2 Ad. Ecc. 1; *Hamerton v. Hamerton*, 1 Hagg. Ecc. 23; *De Blaquiére v. De Blaquiére*, 3 Hagg. 322. And it has been held that it shall be sued for in the spiritual courts, and not in chancery: 2 Show. 290. It may be allotted *pendente lite*. There are instances where the term is used as applied to her maintenance, generally, without regard to a divorce; but in its more usual acceptation it is applicable to an annual sum, or a portion, decreed upon a separation or divorce, *a mensa et thoro*. This is fully shown by numerous cases in the ecclesiastical reports. "In a legal sense it is taken for that allowance which a married woman sues for, and is entitled to, upon separation from her husband:" Jac. L. Dict., tit. Alimony. But as used in this state its signification is not precisely the same. We have here no divorces of that character. No ecclesiastical courts, with a jurisdiction similar to those of England, were ever organized here. Prior to the revolution, divorces are supposed uniformly to have been granted by the legislature, as they are sometimes granted by parliament in England. No law is found giving the ordinary courts of judicature any power upon the subject. They were so granted afterwards, and prior to the adoption of the constitution in 1783.

In the edition of the laws printed 1780, page 115, is an act to dissolve the marriage between Robert Rogers and Elizabeth his wife, passed March 4, 1778. And during the existence of the provincial government, that part of the jurisdiction of the ecclesiastical courts, relating to the probate of wills and settlement of estates, was exercised by judges of probate, with an appeal to the governor and council, as the supreme court of probate: Prov. L. 103-106.

Upon the adoption of the constitution in 1783, it was deemed expedient to make a different provision in this respect, and the clause referred to in the argument was inserted, providing that "all causes of marriage, divorce, and alimony, and all appeals from the respective judges of probate, shall be heard and tried by the superior court, until the legislature shall by law make other provision." It is evident from this view of the matter, that this clause of the constitution was not intended to create

any new rules in relation to marriage, or its dissolution, or the maintenance of married women. It provided for a mere transfer of the jurisdiction which had existed in the assembly and the governor and council, leaving the legislature to make such provision upon the subject as should afterwards be deemed expedient.

In 1791 the legislature passed an act, specifying the causes for which divorces might be granted, and providing that "the justices of the superior court of judicature may, in all cases where a divorce is decreed, restore to the wife all her lands, tenements, and hereditaments, and may assign to the wife such part of the real and personal estate of her late husband, as, all circumstances duly considered, they may think just and reasonable," etc. This act is still in force, and has ever since been regarded as a legislation upon the whole subject, and not as in aid of any practice such as is adopted in the English ecclesiastical courts. It embraces nearly all of the causes of divorce from bed and board in England, and authorizes in all the cases specified, a divorce from the bonds of matrimony. No other provision for the maintenance of the wife, or for alimony, by decree of this court, has been known here, except that authorized by this statute; unless a small sum sometimes ordered to be paid to the wife, to enable her to defend against the application of the husband for a divorce, may be so termed.

There were doubtless two reasons why the legislature, instead of providing for a yearly allowance to the wife, for her maintenance, authorized a restoration of her real estate, and an absolute assignment of a part of the husband's estate. One was, the nature of the separation, being an entire dissolution of the marriage; another, the nature of the property in a new country, where the income depended very much upon personal exertions. Probably the assembly of the province, when they exercised the jurisdiction, made a similar provision for, or in lieu of, alimony. As an allowance to the wife, for her support, upon a divorce, it took the name of alimony, and has long been so designated in legal parlance here. The learned editor of the edition of the laws published in 1815 so designated it in the margin of the act, and in the index of that edition, and this was followed in the edition of 1830.

In Massachusetts the legislature made a somewhat similar enactment for the benefit of the wife, with some further provisions; and in that state, also, what is thus allowed her is understood to be alimony: 1 Mass. Stat., ed. 1807, 303; *West v. West*, 2 Mass. 223. Alimony here, then, as used in the constitution, must be

understood to mean the provision or allowance made to the wife upon a divorce.

It is not suggested that the case of this plaintiff comes within any of the causes for a divorce. If it did, we should not decree it, sitting as a court of chancery. If this bill may be sustained, it must be by virtue of the statute of 1832, which, among other grants of chancery jurisdiction having no reference to matters of this kind, gives the court chancery powers in all cases of fraud, trust, accident, and mistake, where there is not a plain, adequate, and sufficient remedy by the rules of the common law; and allows us, for the purpose of carrying the powers granted into effect and doing equity and justice between party and party, to make all equitable and necessary decrees, orders, and judgments; and contains a further provision, authorizing the granting of writs of injunction, whenever the same shall be necessary to prevent injustice.

The plaintiff's counsel contend that here are three distinct grounds upon which the jurisdiction may be sustained, viz.: trust, fraud, and the prevention of injustice. But this all resolves itself into the question whether here is any trust, within the meaning of the statute, for the benefit of the wife, which the court can enforce. If there is no such trust, there is no fraud suggested that the court can reach, nor any injustice which will authorize the issuing of an injunction. We have not a general jurisdiction to compel husbands to deal justly and kindly by their wives.

There is no question that a trust exists here in the administrator, for the benefit of those entitled to distributive shares in the estate; but there is nothing to enforce against him. It is not pretended that he fails in his duty, and that a remedy must be sought against him here. Does this case disclose a trust for the benefit of the wife, upon which we can proceed, for her relief, against her husband and his assignee? The property in question was derived from the estate of the father of the wife. Had she been unmarried she would have taken the whole absolutely, and the administrator would have held her share of the personal estate, as trustee for her benefit. But at the time of the decease of her father she was under coverture.

In *Commonwealth v. Manly*, 12 Pick. 175, it is said that a legacy given to the wife vests absolutely in the husband, and "so the wife's distributive share in an intestate estate vests in the husband." By this it must have been intended that he may claim or reduce it to possession, to his own use.

Neither a legacy to a wife, nor a distributive share in an estate in which she is interested, vests in the husband absolutely: *Wildman v. Wildman*, 9 Ves. 177. They are not like her personal property in possession, which becomes absolutely his; but they are classed with, and sometimes called, her choses in action: Clancy's Rights, etc., of Husband and Wife, 109, b. 1, c. 8; *Brothero v. Hood*, Com. 725; Com. Dig., Bar. and Feme, E, 3. If the husband reduce them to possession, as he may, they become absolutely his own: Clancy, 111; 2 Story Eq. 631. And he may release them, or assign them for a valuable consideration, and by a deed to which she is not a party: Clancy, 120; *Tucker v. Gordon*, 5 N. H. 564. But until he has reduced them into possession, or in some other way barred her right, he has only a qualified interest, and if he die first the right survives to her: Clancy, 109; *Garforth v. Bradley*, 2 Ves. sen. 675; *Schuyler v. Hall*, 5 Johns. Ch. 196. And possession by the husband, as executor and trustee, is not a sufficient reduction into possession to bar her of her right: *Baker v. Hall*, 12 Ves. 497; *Wall v. Tomlinson*, 16 Ves. 413. If, however, he survive his wife, he is entitled to administration, and to recover and receive them to his own use: *Humphrey v. Bullen*, 1 Atk. 458; *Whitaker v. Whitaker*, 6 Johns. 112; *Squib v. Wyn*, 1 P. Wms. 380; and *Carl v. Rees*, cited 381; 3 N. H. 129; *Judge etc. v. Chamberlain*, 2 Kent Com. 114.

The distributive share of the plaintiff in her father's estate the husband may claim and receive to his own use; but until he has received, released, or assigned it, or in some way barred her right, she has an interest which may survive to her in the event of his decease. If the husband makes a voluntary assignment of the wife's portion, it is said the volunteer must stand in the place of the husband: *Jewson v. Moulson*, 2 Atk. 420; 1 Bro. Ch. 51;¹ 9 Ves. 99.²

There being here a trust in the administrator, which might inure to the benefit of the plaintiff, if her right is not barred by the proceedings of the husband, this court has jurisdiction of the subject-matter of it, as such, under the clause of the statute which has been cited; and when a proper case arises for enforcing her rights against the administrator may entertain a bill for that purpose; as, if the husband should die without reducing it into possession, or having made an assignment or release which would operate against her. And we might, perhaps, in such

1. *Saddington v. Kinsman*.

2. *Milford v. Milford*.

case inquire whether the assignment was for a valuable consideration.

But the important question in this case still remains: Has she any rights which the court can protect and enforce against her husband and his assignee on the facts disclosed in this bill, assuming them to be true?

Courts of equity will not interfere to restrain or limit the husband in the just exercise of his marital rights: 2 Story Eq. 631. But the court of chancery, in England, has in many instances, under particular circumstances, sustained applications for similar relief to that asked in this case. The grounds upon which they entertain this jurisdiction have not been uniform, and the principle on which it is supported is not quite clear.

Mr. Justice Story does not seem, in his Commentaries on Equity Jurisprudence, to have traced its origin, or stated the progress of this jurisdiction. After stating that courts of equity do not assert any general jurisdiction to decree a suitable maintenance for the wife out of the husband's property because he has deserted her, etc., he says: "Whenever the wife has any equitable property within the reach of the jurisdiction of courts of equity, they will lay hold of it; and in such case of the desertion or ill-treatment of the wife by the husband, as well as in the case of his inability or refusal to maintain her, they will decree her a suitable maintenance, out of such equitable funds. The general ground on which this jurisdiction is asserted, is, that the law, when it gives the property of the wife to the husband, imposes on him the correspondent obligation of maintaining her, and that obligation will fasten itself upon such equitable property in the nature of a lien or trust, which a court of equity, when necessary, will, in pursuance of its duty, enforce:" 2 Story Eq. 650. Here the jurisdiction is placed upon the ground that the obligation of the husband to maintain the wife fastens itself upon the equitable property, in the nature of a lien or trust. But that obligation is equally imperative whether she have any property or not, and might equally well fasten itself upon his estate, however acquired.

In another place, speaking of the maxim that he who seeks equity must do equity, he gives, as one of the illustrations and instances in which it will be applied—where a husband seeks to recover his wife's property, and he has made no settlement upon her: 1 Story Eq. 78. It would seem that this jurisdiction to provide for the wife's maintenance out of her equitable interests, in case of desertion, and also for a settlement to be made

upon her, out of her equitable interests, where no desertion existed, had its origin in this maxim.

Thus in *Nichols v. Danvers et al.*, *contra*. A wife having been used with cruelty by her husband, became entitled to a share of her mother's personal estate, who died intestate. The interest was decreed to the wife, for her separate use, and then to the husband if he survived; afterwards the principal to be paid to the issue, and if no issue, then to the survivor of the husband and wife: 2 Vern. 671. In Mr. Raithby's note it appears that the decree recited as a ground for it, "the defendant being obliged to come into equity for the same," and proceeded upon that ground. A special agreement was mentioned and supposed to be the ground by Lord Ellenborough: 2 East, 283-294. So in *Williams v. Callow et al.*, *contra*, the husband brought a bill and the wife a cross-bill. It was a case of cruelty, and the husband was wasting his substance: 2 Vern. 752. So in *Oxenden v. Oxenden et al.*, *contra*, the husband having by his cruelty forced his wife to separate from him; Lady Oxenden's bill was to have a marriage agreement performed, and an allowance for maintenance. Sir James' cross-bill was to have part of the wife's portion invested, etc. The lord-keeper, Wright, said that as a court of equity will oblige a husband who comes into equity for his wife's portion, to make a settlement upon the wife by way of jointure, or to secure a maintenance to her in case she outlive the husband, the court ought much rather to do it where the wife is at present reduced to a starving condition, and especially where, as in this case, the execution of a trust is to be directed by the court: 2 Vern. 493.

It seems that in *Colemore v. Colemore*, before Lord Chancellor King, the husband had, after a sentence for alimony, made over his whole estate to trustees, and then went to the West Indies; and upon a bill, brought by the wife against the trustees, he directed them to pay her a considerable maintenance out of the trust estate, whilst the husband resided abroad: *Vide* the case cited 3 Atk. 295. That case was after a divorce, and decree of alimony, and for the purpose of securing the wife's maintenance, because the husband attempted to evade the payment of the alimony. It seems to have been a mode of enforcing the decree for alimony. But in *Walkyns v. Walkyns*, 2 Atk. 96, where the wife brought a bill for maintenance, on suggestion of cruel usage, Lord Hardwicke said: "I can do no more in this case than Lord Chancellor King did in the case of *Colemore v. Colemore*, when he framed his decree by way of analogy to the writ

of *ne exeat regno*, and impounded the fortune of the husband for the wife's maintenance, until his return;" and he referred it to a master, to take an account of the personal estate of the plaintiff before her marriage, which had come to the hands of the defendant since her marriage, etc. And as the husband had possessed himself of his wife's fortune, and gone out of the kingdom, he ordered the interest of a certain sum to be paid to her, until he thought proper to return and maintain her.

This is the first case that I find where the court departed from the principle that they could not interfere except where the husband sought the aid of the court; and this was assumed by analogy to a case where the husband attempted to avoid a decree of the ecclesiastical court for the payment of alimony. Mr. Saunders, the editor, says, in a note: "But notwithstanding this case, and that of *Williams v. Callow*, 2 Vern. 752, it seems that the court of chancery can not compel the husband to pay a separate maintenance to the wife, unless upon an agreement between them, or after a divorce in the ecclesiastical court." He refers to *Head v. Head*, 3 Atk. 547-550, and 1 Fonb. Eq. 96, *Head v. Head* was a bill by the wife, against the husband, to establish her separate maintenance. Lord Hardwicke said: "The two principal grounds for bills of this kind are an agreement for maintenance, or a trust for this purpose; and in either of these cases the court will entertain a suit for alimony and maintenance, and even after a sentence in the ecclesiastical court for it, where the husband in order to evade it is going out of the kingdom, will, upon a bill filed by the wife, grant a *ne exeat regno*;" and he then refers to *Colemore v. Colemore*, 3 Atk. 295.

Since the time of *Walkyns v. Walkyns*, the principle upon which the court will provide for the maintenance of the wife seems not to have been confined to cases where the husband sought the aid of the court, but has been enlarging from time to time.

In *Sleech v. Thorington*, 2 Ves. sen. 562, Sir Thomas Clark, M. R., in delivering the opinion, says: "In general, where a husband comes into court for the wife's property, or anything he claims in her right, *jure mariti*, he is obliged to submit to the terms of the court, and make a settlement, or reasonable provision, out of that. Various instances have been, where the wife has insisted the husband should have nothing; the court has not thought itself empowered to take from the husband the wife's fortune, so long as he is willing to live with and maintain her, and no reason for their living apart: even where the husband

will not come in before the master, the court will not go so far as to do anything in diminution of the husband's right so as to take away the produce from him, or prevent his receiving the interest, but constantly, where he maintains the wife, accompanies the direction for a suspension, with payment of the interest to the husband. It is otherwise where he leaves her unprovided: *Colmer v. Colmer*, by Lord King. But more particularly in *Walkyns v. Walkyns*, Dec. 10, 1740, where exactly like this case the husband was gone abroad, and left his wife unprovided for, the court laid hands on the money which was in the power of the court, and directed the payment of the interest to the wife, until the husband returned and made provision for her, as he ought." "In the power of the court," here, must mean, "within the kingdom," for the husband had in that case reduced the property into possession, and it was in no other way in the power of the court, until, as the master of the rolls expresses it, "the court laid hands" upon it.

It is apparent that this laid a broad foundation as the basis of the jurisdiction; for if the husband deserted the wife, and left the kingdom, leaving property which had come in right of the wife (although he had reduced it to possession, according to the case of *Walkyns v. Walkyns*), the court might interfere, on her application. Subsequent cases place the jurisdiction of the court on the original ground.

In *Pryor v. Hill*, 4 Bro. Ch. 143, where the husband had made a general assignment for the benefit of creditors, and the wife, being entitled to the interest of funds for life, the assignees brought a bill to be paid the interest and dividends, Sir Richard Pepper Arden, the master of the rolls, recognized the original principle. He said: "If the parties can not agree, I can only say I can not assist the assignees to get it without their making a provision." And in *Burdon v. Dean*, 2 Ves. jun. 606, which was a bill by the assignees of the husband, who was a bankrupt, he said, "The next question is, whether the plaintiffs can get anything without the intervention of this court." "I have no objection to what they can get at law; but if they come into this court, I will not extend the arm of the court to give them any other part of her property without a consideration for it."

But in *Wright v. Morley* and *Morley v. St. Alban*, 11 Ves. 12, 23, the master of the rolls, Sir William Grant, cited *Walkyns v. Walkyns*, and other cases which have been referred to, and held that if the husband has gone abroad, and left the wife unprovided for, a decree might be made to pay her dividends on stock

held in trust for her. And in *Duncan v. Duncan*, 19 Ves. 395, he said, "the cases in which subsistence has been provided by the court are, either where the husband has turned her" (the wife) "out of doors, or by ill-treatment obliged her to leave his house, or had quitted the kingdom leaving her destitute;" and he cited, among other cases, *Walkyns v. Walkyns*, *Sleece v. Thorington*, etc.

It may be taken to be now settled in the English court of chancery, that a bill in behalf of the wife will be sustained in such cases. Clancy, treating of the equity of a married woman to a provision out of her equitable interests, where she had been abandoned or ill-treated by her husband, says: "The nature of this equitable relief is this, that whenever a husband abandons his wife, and leaves her without the means of subsistence, or elsewhere he treats her so ill as to force her to quit his house, in either of these events if she file a bill by her next friend against him, praying that an allowance may be secured to her out of the produce of her own fortune which is in the power of the court, a decree will be made according to this prayer. But the dispensation of this favor on such occasions arises wholly from the wife's fortune which the court has within its reach; her maintenance must, if at all, be served out of that; for without it equity has no jurisdiction to interfere, and the wife must go without redress. Whatever the nature and extent of her sufferings may have been; whether she has been left by her husband destitute of the means of support, or has been driven from her home by the cruelty or violence of his demeanor towards her; however large her portion may have been, if he have reduced it into possession, or if it be of a legal quality, equity can give her no relief, as neither the person nor the property of the husband can be made liable in that court to a maintenance for his wife under such circumstances:" Clancy's Rights etc. of Husband and Wife, 447.

It is clear, from this examination of the cases, that this jurisdiction is not maintained upon the ground merely of a trust which the court has power to enforce, but it is a separate branch of equity, and it is, in the elementary writers, denominated the wife's equity to a provision or maintenance. The changes in this branch of equity jurisprudence have but followed, or accompanied, the changes respecting the wife's equity to settlement out of her estate.

The nature of this equity to a settlement is thus stated by Mr. Clancy: "If a husband, or any person claiming in his right,

seeks to reduce into possession that part of the wife's portion which is of an equitable nature, chancery will in most instances insist on a provision for her out of it, where no settlement or an inadequate settlement has been made upon her. If the wife's fortune be within the reach of the court, as, if it were vested in trustees, or if it have been paid by the trustees into court, or if it be in any other situation in which it would be under the direction and control of a court of equity, that court will not suffer it to be removed out of its jurisdiction until an adequate provision shall be made for her, unless she has been already sufficiently provided for, or unless, on her personal examination, she waives the benefit of this protection; and this is called 'the wife's equity:'" Clancy, 441.

In *Micoe v. Powell et ux. et al.*, 1 Vern. 37, an infant, entitled to the trust of lands in fee, married without the consent of the father. The father brought a bill against the husband and wife and her trustees, that a provision might be made for her out of these lands. The husband and wife demurred to the bill, and the demurrer was allowed by Lord Chancellor Nottingham. "But he said if Mr. Powell had been plaintiff here in chancery, to have the trustees transfer their estate, or for any other favor of the court, then, indeed, when he had such a hand upon Mr. Powell, he could make him do such things as should be reasonable." And in *Lupton et ux. v. Tempest*, 2 Id. 626, the trustees asking that the husband should make a settlement, Lord Chancellor Cowper said: "Where husband and wife join and demand execution of a trust of real estate, it must be decreed according to the will, because the wife demands it. But where a husband comes for a personal demand in the right of his wife, or for raising a sum of money, there the court may impose terms on the husband, as being in diminution of the husband's right.

So in *Milner v. Colmer*, 2 P. Wms. 639, the husband had applied to the court for his wife's portion; and the court, on application of his wife's mother, directed him to lay proposals for a settlement before a master. In that case Lord Chancellor King said, "he thought it extraordinary that this court should interpose against the husband in cases where the law gives him a title to the wife's personal estate," etc. In *Adams v. Pierce*, 3 Id. 11, the plaintiff, who was executor in trust, brought the bill to pass his own accounts, and that the husbands of two daughters of the testator, who were his residuary legatees, might make additional settlements, Lord Chancellor Macclesfield said, "The executor here is plaintiff, and not the husband; if the latter had

asked any aid in equity, the court would have refused granting it but on such terms as should appear reasonable."

In *Brown and Wife v. Ellon*, 3 P. Wms. 202, the husband demanded the legacy, but the executor refused to pay unless some settlement or provision were made for the lady, and the husband with his wife brought the bill. It was urged for the defendant that those who would have equity ought to do equity, etc. Lord Chancellor King said: "I found it to be the practice at my coming into this court, to enforce the husband, before he recovers by the aid of equity his wife's portion, to make a settlement; and as such practice has so long obtained, I shall not at this time take upon me to alter it, although it seems to break in upon the legal title which the husband has to the wife's personal estate," etc. So in *Bond v. Simmons*, 3 Atk. 19, the husband had brought a bill for the legacy to his wife, and refused to make a settlement.

It is not necessary at this time to trace the cases farther. The change is shown by the following paragraphs from Mr. Clancy's treatise:

"When it is said that a court of equity will insist on a provision for a married woman out of her equitable interests, it is not to be understood that where she has property of that nature a provision will at all events be enforced for her; for in fact a court of equity has no power of exacting a settlement for a married woman out of this part of her portion, unless her husband, or some person claiming through him, seeks to acquire the possession of it. For if the husband does not require the possession of his wife's fortune, and will be content with the interest of it, to which he has a right so long as he maintains her, he can not be obliged to make any settlement upon her:" Clancy, 445. "At first, indeed, this equity was administered only in cases where the husband required the assistance of the court to get the possession of his wife's fortune; and the reason then given for putting him under terms in such a case, was that as he sought equity he must do equity. But now this protection is extended to all instances where the equitable interests of the wife are the object of the suit, whether the court be applied to by the husband or his assignees, to obtain the possession of them, or by the wife or her trustees, or by any other person on her behalf, praying for a provision for her out of them:" Id. 446; *Vide*, also, 452, 453, 472, 474.

Judge Story says: "The principal, if not the sole cases, in which courts of equity now interfere to secure the wife her

equity to a settlement are, first, where the husband seeks aid or relief in regard to her property; secondly, where he makes an assignment of her equitable interests; thirdly, where she seeks the like relief as plaintiff against her husband or his assignees in regard to her equitable interests:" 2 Story Eq. 633. The last class may well, in effect, include the two former; for if she may proceed against him, or his assignees, in all cases, it covers the whole ground. The paragraph shows the progress of the jurisdiction.

The cases in New York have followed the practice in England: *Howard et ux. v. Moffat*, 2 Johns. Ch. 206; *Kenny v. Udall*, 5 Id. 464; S. C., 3 Cow. 590; *Haviland v. Bloom and Myers*, 6 Johns. Ch. 25, 178; and *Van Epps v. Van Deusen*, 4 Paige Ch. 74. In the first of these cases the rule is stated: "If the husband can lay hold of the property without the aid of a court of equity, he may do it; the court has not the means of enforcing a settlement by interfering with his remedies at law." But in *Kenny v. Udall*, Chancellor Kent said: "It is now understood to be settled, that the wife's equity attaches upon her personal property when it is subject to the jurisdiction of the court, and is the object of the suit, into whosoever hands it may have come, or in whatever manner it may have been transferred. The same rule applies, whether the application be by the husband or his representatives or assignees to obtain possession of the property, or whether it be by the wife or her trustee, or by any person partaking of that character, praying for a provision out of that property." In 2 Kent Com. 119 (1st ed.), he inclines to the opinion that the claim attaches only on that part of the wife's personal fortune which the husband can not acquire without the aid of a court of equity; and that if he can acquire possession of it without a suit at law or in equity or by a suit at law without the aid of chancery (except, perhaps, as to legacies and portions by will or inheritance), the husband will not be disturbed in the exercise of that right. But in *Van Epps v. Van Deusen*, Chancellor Walworth says: "If the wife is entitled to such an equity upon a bill filed by a husband or his assignee, or by a third person, as all the cases upon this subject admit, I can see no valid objection in principle against granting her similar relief where the husband, or the general assignee in bankruptcy, is endeavoring to deprive her of that equity by an unconscientious proceeding at law."

The court of chancery in England has interfered to restrain the husband from proceeding to recover a legacy to the wife:

2 Story Eq. 632 and note; Toller on Ex'rs, 490; Clancy, 443, and cases cited. And Mr. Clancy contends that "the same jurisdiction should restrain the husband from availing himself of any means, either at law or in equity, of possessing himself of the wife's legal choses in action without making a competent provision for her;" and some of the cases certainly countenance such an application of it: Clancy, 468. It is said that equity "does not controvert the legal title of the husband to his wife's personalty, and to the rents and profits of her real estate during her life; on the contrary, it admits the law upon the subject to its fullest extent; for if he have once acquired the possession of that property, though it had been of an equitable nature, this court will leave him in the undisturbed enjoyment of it. Before a suit has been instituted to enforce the claims of the wife, the husband may, if he can, get her property into his hands, and her trustee, may, if he thinks fit, give that property to him, and the court will not interfere:" *Id.* 442; Story's Eq. 631. But according to the case *Watkyns v. Watkyns*, before cited, the court will interfere in some cases where the husband has obtained possession.

If we sustain this bill and direct or provide for an allowance to the wife out of her share in the estate of her father, on the ground of a trust, and because the wife has been deserted, we must also, upon application, provide for a settlement upon a wife out of her equitable interests, where there has been no desertion.

Mr. Clancy states the difference between the two cases, but there is no difference which can make a distinction in this respect. He says: "The provision which is secured to a married woman under the circumstance of desertion or ill treatment by her husband, resembles both the wife's equity and her separate property, though in fact it is substantially different from both. It is like her separate property, because it is payable to her separately and distinctly from her husband; but then it is unlike separate property in this respect, that she has not the complete command of it, and she can not anticipate the future gales by a sale or other disposal of it, but must wait until they become due. It is like the wife's equity, because it is an arrangement by the court for her security resulting from her equitable interests; but it is unlike the wife's equity, because it is always a present income during the husband's life, and intended to relieve immediate necessities; whereas the wife's equity is future, and is intended not as the means of present support, but as the

security for a future subsistence after the husband's death, except, indeed, he becomes incompetent to support her, by bankruptcy or insolvency, and then indeed it is a present provision. There is this further difference between this separate maintenance and the wife's equity, that the former continues only until the husband returns to his duty, and conducts himself towards her as he ought, while the latter continues from the period of its commencement until the death of the wife. And nothing can more strongly evince the vigilance of a court of equity in the interests of married women, than the enforcement of these provisions; for by such arrangements a settlement may be secured to her out of her fortune, not only after her husband's death, but even during his life-time, if it should be expedient for her—thus guarding her against the possibility of future danger, and applying a remedy for her present wants:" Clancy, 448.

It is apparent from this, that so far as the right and the duty of the court to interfere in behalf of the wife are concerned, the two classes of cases are alike. There is the same kind of equitable property as the foundation in both cases—there is in both an arrangement by the court for her security, resulting from her equitable interests—and in both cases it is intended as a provision for her, although it may in some cases extend to her children. The difference is, that in one case the provision is intended for present support, and may cease when he provides; in the other it is intended for future maintenance, but may, if he fails to support her, from insolvency, be a present provision. It is useless to attempt to sustain this jurisdiction upon the ground of enforcing a trust properly so called.

Judge Story, speaking of the wife's equity to a settlement, says: "It is not easy to ascertain the precise origin of this right of the wife, or the precise grounds upon which it was first established. It has been said that it is an equity, grounded upon natural justice; that it is that kind of parental care which a court of equity exercises for the benefit of orphans, and that as a father would not have married his daughter without insisting upon some provision, so a court of equity, which stands *in loco parentis*, will insist upon it. This is not so much a statement of the origin as it is of the effect and value of the jurisdiction. The truth seems to be that its origin can not be traced to any distinct source. It is the creature of a court of equity, and stands upon its own peculiar doctrine and practice. It is in vain to attempt, by general reasoning, to ascertain the nature or extent of the doctrine, and therefore we must look entirely to the practice

of the court for its proper foundation and exercise:" 2 Story Eq. 635; *vide*, also, 636. There is here no suggestion that it originates or can be supported on the ground of enforcing a trust; and over this "creature of a court of equity" thus originating from its practice, our statute has given us no jurisdiction.

In Pennsylvania, where the common law courts exercise some equity powers, the supreme court came to the conclusion that they did not possess such a power: *Yohe v. Barnet*, 1 Binn. 358. Chief Justice Tilghman said: "It is to be regretted that the courts in this state are not vested with the power, exercised by the courts of chancery in England, of insisting on some provision for the wife, where the husband applies to them for the purpose of getting possession of her personal property. But we have no trace of any such exercise of power by our courts. It must be taken for granted, then, that they possess no such power."

It is not from any particular admiration of the rules of the common law in this respect, that we have come to the conclusion that we have not jurisdiction in the present case. Could we find a sound principle on which to interfere in behalf of this plaintiff, we should most cheerfully do so, on such a case as is stated in her bill. It may be very desirable that the legislature should make further provisions, securing to wives some interest in the personal property which they may have on the marriage, or which may accrue to them afterwards. Many a case of great hardship has arisen from the improvidence, or iniquity, and desertion of the husband; but in the present state of our law we can not assert a general jurisdiction to require a settlement, or provide for a maintenance.

If the husband or his assignee shall have occasion for the aid of the court, to enable him to obtain possession of the distributive share of the plaintiff, perhaps we may apply the principle that he who asks equity must do equity, and require him to make provision for her support out of the fund, before we aid him in recovering it. This principle may well be applied in the exercise of any chancery powers we possess, and perhaps in any case where it would be necessary to proceed in chancery in England, but where the party may here, by our practice, proceed at law. But we can not deduce from it an original jurisdiction not conferred by the statute.

ALIMONY, JURISDICTION OF COURTS OF EQUITY TO GRANT: See note to *Lockridge v. Lockridge*, 28 Am. Dec. 55, where the other cases on this subject contained in this series are collected. The principal case is cited in *Sheafe v.*

Sheafe, 24 N. H. 567, to the point that the term "alimony," in New Hampshire, means an allowance made to a wife on a decree of divorce; in *Shannon v. Shannon*, 2 Gray, 287, to the point that statutes authorizing the granting of alimony only authorize it after a decree of divorce; in *Burrows v. Purple*, 107 Mass. 432, to the point that in some states the word "alimony" is commonly used as equally applicable to all allowances, whether annual or in gross, made to a wife upon a decree of divorce; in *Trotter v. Trotter*, 77 Ill. 512, to the point that alimony is incidental to other relief; and in the dissenting opinion of Sprague, J., in *Galland v. Galland*, 38 Cal. 277, to the point that alimony is inseparable from divorce.

EXECUTORS OF WILL ARE TRUSTEES for a wife, of property bequeathed by it to her separate use: *Robinson v. Executors of Dart*, 31 Am. Dec. 569.

ADMINISTRATOR IS TRUSTEE for the heirs, not for the creditors, of his intestate: *McCoy v. Scott*, 19 Am. Dec. 640, note 642.

HUSBAND'S POWER OVER WIFE'S PROPERTY AT COMMON LAW: See *Slocumb v. Breedlove*, 28 Am. Dec. 135, note 137.

HOIT v. UNDERHILL.

[9 NEW HAMPSHIRE, 436.]

INFANCY, RATIFICATION OF CONTRACTS MADE DURING.—Mere declarations of intention of a party to perform a contract entered into by him during infancy, when made to a third person in no way interested in the matter, are not evidence of such ratification of the contract as will render him liable thereon; to constitute a ratification there must be either a direct promise, after the infant comes of age, to the party himself or to his agent, or acts and declarations, or acts alone, showing a clear recognition and confirmation of the contract.

ASSUMPSIT, for money paid, and money had and received. Plea, the general issue, by guardian, the defendant being a spendthrift. The plaintiff signed a note with the defendant during the latter's infancy, and was afterwards compelled to pay it. The plaintiff proved that after the defendant came of age he stated in the presence of others that he meant to pay Hoit all he had paid for him; that it was justly due to Hoit, and he would pay him. The defendant objected to this testimony, because it was not proved that these declarations were made in the presence of the plaintiff or to any agent of the plaintiff. The court overruled the objection. The jury found for the plaintiff, and the defendant moved for a new trial on the ground of misdirection.

H. F. French, for the defendant.

Pillsbury, for the plaintiff.

UPHAM, J. We have been unable to find any case that comes so near the present as that of *Orvis v. Kimball*, 3 N. H. 314. In

that case it appeared in evidence that the defendant, after he arrived at the age of twenty-one years, had declared his intention to pay the note then in suit; but it did not appear that this declaration was made in presence of the plaintiff or his agent. It further appeared, that when of age the defendant employed an agent to find and pay the note; but it did not appear that the agent had done anything upon the subject.

The court, in delivering their opinion, say, that "the mere declaration of an intention to pay, made by an adult, is not sufficient to bind him to pay a note, made when he was an infant; still, we think that when, as in this case, he employs an agent to find the note, and authorizes that agent to pay it after he arrives at the age of twenty-one years, these acts amount to such a confirmation of the contract as ought to bind him." They further remark, "that where an individual, after arriving at years of discretion, deliberately adopts a contract, and gives evidence of this, not only by his declaration, but by his acts, we think he ought to be bound." It is apparent, from this statement of that case, that the decision depended not on the mere declarations of the party after arriving of age, but declarations accompanied with acts showing a design of payment deliberately formed, and entitled, therefore, to more weight than mere declarations could give.

This case goes as far, at least, we believe, as any adjudged authority, and we regard it as decisive of the case before us. Here there is no evidence of a ratification of the debts after the defendant arrived of age, excepting mere declarations to third persons, wholly uninterested in the note; and we are clearly of opinion that a mere design of payment, or an expression made to a third person, of a determination to pay, can not be regarded as evidence of a promise of such a nature as to render an individual liable on a contract entered into when an infant. There must be either a direct promise, voluntarily made, after the individual becomes of age, to the party himself, or his agent, to pay; or there may be a ratification of the contract by certain acts, accompanied by declarations, showing a clear recognition and confirmation of the contract; or by acts alone, such as the sale of real estate, or disposal of other property, after the infant has become of age, or the use and improvement of such estate or property when sufficient time has expired to afford him a reasonable opportunity to rescind the contract, and he neglects it, in order to render an individual liable after he becomes of age, for his contracts made when an infant: 2 Stark. Ev. 725; *Martin v.*

May,¹ 10 Mass. 187; *Whitney et al. v. Dutch et al.*, 14 Id. 457 [7 Am. Dec. 229]; *Barnaby v. Barnaby*, 1 Pick. 221; *Hale v. Ger-rish*, 8 N. H. 374; *Lawson v. Lovejoy*, 8 Greenl. 405; *Hubbard et al., Ex'rs, v. Cummings*, 1 Id. 11; Com. Dig., E, Infant, C, 6, 8; *Dana et al. v. Coombs*, 6 Greenl. 89 [19 Am. Dec. 194]; *Boston Bank v. Chamberlain*, 15 Mass. 220.

The evidence here is not sufficient to bring this case within either of the classes named. It shows no new promise or ratification of the contract, within any acknowledged principle for authority. The instructions, therefore, given on the trial, were erroneous, and the verdict must be set aside.

RATIFICATION OF CONTRACT OF INFANT: See *Wheaton v. East*, 26 Am Dec. 251, note 254, where the other cases are collected. The principal case is cited in *Burnham v. Porter*, 24 N. H. 581, to the point that a mere declaration made to a third person is not a sufficient ratification by an infant.

WHITTIER v. COCHECO MFG. CO.

[9 NEW HAMPSHIRE, 454.]

PERSON HAVING RIGHT TO USE CERTAIN QUANTITY OF WATER in a stream for mill purposes, may change the mode and place of using it, provided the quantity used is not increased, and the change does not prejudice the rights of others; hence a mill-owner may raise his gates at a dam where he has acquired a right to use a certain quantity of water, and allow it to pass through, in order that he may use it at points further down the stream.

SUCH OWNER MAY DRAW A LARGER QUANTITY through such gates than he was accustomed to use, if the surplus was provided by him by means of a reservoir higher up the stream.

CASE. The plaintiff's declaration alleged that in January, 1831, he was and still is possessed of a fulling-mill on the south-erly side of the Cocheco river, and of a dam across it, and had a right of drawing such portion of water from above the dam as was necessary to full such quantity of cloth or skins as he might have occasion for; and that he had occasion to full ten thousand yards of cloth annually; yet the defendant let off and drew off the water above said dam in such quantities as to deprive the plaintiff of this right. By the conveyance from the plaintiff to Williams & Wendell, which is referred to in the opinion, he conveyed to them all the right derived from Watson & Son, re-serving only to himself the privilege of drawing such portion of water from such pond as might be necessary to full such quan-

1. *Martin v. Mayo*, 6 Am. Dec. 103.

tity of cloth as he might have occasion for, or for fulling skins. The court instructed the jury that the defendants had a right to hoist their gates at Waldron's falls, and draw off the water without using it there, in order to supply their factories below, provided they drew no more than the owners of the mills on the north side had been accustomed to draw for the use of their mills, for a period of twenty years prior to 1828. The jury found for the defendants, and the plaintiff excepted to the instructions. The other facts are stated in the opinion.

Hale and Woodman, for the plaintiff.

Christie and Bartlett, for the defendants.

PARKER, C. J. It appears from the case, that the defendants, and those under whom they claim, have for more than fifty years possessed certain mills, on the northerly side of the Cochecho river, at Waldron's falls, there being a dam across the river at that place, and that they have been accustomed to use the water there, for those mills, during that period. There does not seem to have been any mill at the southerly end of the dam, when Watson & Son, in 1819, conveyed the acre of land at that place, with a mill privilege. There is nothing to show the extent of the mill privilege which Watson & Son undertook to convey; but as the uninterrupted use of water for a period of twenty years is evidence of a grant and right to use it, Watson & Son, so far as appears, had no right to any privilege which would interfere with those under whom the defendants hold the mills on the northerly side of the river, and prevent them from using the quantity of water that they had been accustomed to do. The conveyance of the mill privilege, by the Watsons, to the plaintiff, therefore, gave him no right to any privilege adverse to that which had been exercised by the defendants' grantors; and of course the plaintiff, when, in his conveyance to Williams & Wendall he reserved to himself the right to use water for fulling cloth or skins, could not reserve to himself any rights inconsistent with those which had been, for so long a period, exercised by the owners of the mills on the northerly side of the river. They had the right of using the water to the same extent that they had been accustomed to do for a period of twenty years previous to that time.

Whether the quantity used had been increased within the period of ten years prior to 1819, or whether the owners of the mills on the north increased the quantity used by them, after that time, and before 1828, does not appear, nor does it seem

to be material to this case. It does appear that they continued the use of the water without any interruption up to 1828, or about that time, when the plaintiff built his fulling-mill; and by the rule before adverted to, their use of it, for the twenty years next preceding that time, furnished evidence of a right, to the extent of the use during that period. If it had been increased between 1819 and 1828, the increased use within that time would not have furnished evidence of a grant.

This being the nature of the rights of the defendants, as derived from the owners of the mills on the north side of the river, at the time when the plaintiff complains that they drew off the water to his injury: it appears that, being desirous of using the water at their factories below, instead of using it in the operation of their mills at Waldron's falls, they hoisted their gates and permitted the water to flow through them, without any use of it at that place. There is nothing in this injurious to the plaintiff, unless they in this way drew more water than they had the right to use. It is settled that where a right exists to use a certain quantity of water, a change in the mode and objects of the use, without increasing the quantity, is no violation of the right: *Bullen v. Runnels*, 2 N. H. 255 [9 Am. Dec. 55]; *Johnson v. Rand*, 6 Id. 22. The plaintiff would have had no ground of complaint had the defendants erected their factories at Waldron's falls, and applied the water to them, to the extent that it had been used there; and his rights are no more prejudiced by the defendants' opening their gates, and using the water three miles below, provided they use no greater quantity, than they would be by a change of the use at that place. It is immaterial to the plaintiff at what spot the defendants apply the water to a wheel, or what machinery that wheel turns, so long as they do not exceed their rights in the quantity they use: *Saunders v. Newman*, 1 Barn. & Ald. 261; *Tyler v. Wilkinson*, 4 Mason, 404. The instructions to the jury on this branch of the case seem to be fully warranted by the cases above cited.

The next question arises upon the instructions to the jury, that the defendants might draw through their gates, in dry seasons, even a larger quantity of water than they had been accustomed to draw prior to 1828, if the excess was furnished by themselves, by means of a reservoir they had constructed above. This part of the case depends upon some special circumstances, probably not often existing. The defendants appear to have provided a supply of water at Bow pond, the outlet of which empties into the Cocheco river, for the use of their factories in

time of drought. There is no complaint that in making provision for this supply they have infringed any rights. If there was, it could not be tried in this case. In order to use this water at their factories in Dover, it must pass Waldron's falls; and the question is, whether the defendants are obliged to shut their gates at that place, so that the plaintiff may have the use of the additional water thus provided as it passes those falls, or to use it in part themselves there, in order that the plaintiff may use it with them; or whether they may suffer their gates to stand open, and this additional water to pass without use by any one.

On the case before us, the plaintiff has no right to have this water pass Waldron's falls. The defendants may pen it back, and permit it to evaporate without suffering it to come into the Cocheco river. It is derived from a reservoir provided by them for their own purposes, and the plaintiff can maintain no action for depriving him of the use of it in that mode. On what principle, then, is his right infringed, if they let the water into the river, hoist their gates at Waldron's falls, and permit it to pass by? on what ground are they obliged to pen it up there, for the plaintiff's benefit?

Suppose, instead of a mill, the plaintiff was the owner of a meadow, lying upon the Cocheco, above Waldron's falls, which in ordinary stages of water, in the summer, prior to the construction of the reservoir at Bow pond, had not been affected by the water; and that if the defendants were now to let the water out of the reservoir, in the summer, and pen it up by the dam at Waldron's falls until they had occasion to use it for their works there, the plaintiff's meadow would be overflowed thereby and injured. He would most clearly have a right to complain of that, and his complaint would be, in substance, that the defendants did not open their gates there and let the water pass; but that by means of their dam they threw the water back upon his land. This may serve to show that he can not object to the act of the defendants in drawing the water through their gates, unless he can show a right to the use of it, and a duty upon the part of the defendants not to deprive him of that use. As the owner of a mill, situate on the river, he would have been entitled to the use of it from the mere fact that it ran in the channel, had not the defendants provided it and turned it into the river for their own use; and on the other hand, as the owner of a meadow, he would have been subjected to the injury it

might have occasioned him, without any right of redress, but for the same reason. The defendants' rights and duties are not dependent upon the mere fact whether the plaintiff owns a mill, or a meadow. There must be something beyond that. Some other person or persons may, as owners of land, have a right of action against the defendants, should they detain this water at Waldron's falls, as the plaintiff contends they ought to do. Suppose again, the plaintiff, being the owner of the mill, was also owner of land above, which would be affected by this water. It would present a strange case, if he had the right to sue the defendants if they hoisted their gates and let the water run through, on account of the injury thereby done to his mill; and the right to sustain an action against them for the injury done to his land above, if they shut their gates and detained the water there.

These suppositions are made merely for the purpose of testing the grounds upon which the plaintiff's claim rests, so far as this surplus water is concerned; and we are of opinion that the plaintiff wholly fails to establish a right to the use of it, and of course to show that the act of the defendants in hoisting their gates and letting it pass, is an injury to him. If the defendants have transcended their rights by penning the water back at Bow pond, and then letting it off at a different period of the year, by reason of which the plaintiff is injured, that might furnish a ground of action; but the present action is not brought for any injury of that character, nor would the facts presented in this case sustain such an action, if it was before us.

We have considered this case as if Watson & Son, when they conveyed, in 1819, could grant the right to use, at the southerly end of the dam, all the water ordinarily running in the stream, beyond the quantity which the defendants, and those under whom they claim, had been accustomed to use on the northerly side. Whether, however, Watson & Son could convey such a right, or whether the right to the use of such water would belong equally to the owners on both sides of the river, or whether the long continuance of the mills on the northerly side, without any use at the southerly end of the dam, is to be regarded as evidence of a right to erect a dam and use all the water of the river at pleasure upon the north side, are questions which we have not considered, and upon which we do not intend to intimate an opinion.

Judgment for the defendants.

WATER RIGHTS: See *Hoy v. Sterrett*, 27 Am. Dec. 313, and note 318, where the other cases in these reports are collected. The principal case is cited in *Kidd v. Laird*, 15 Cal. 181, to the point that a change may be made in the place of using water as well as in the mode and objects of its use, if the quantity used is not increased, and the change is not to the prejudice of others.

ODIORNE v. LYFORD.

[9 NEW HAMPSHIRE, 502.]

TENANT IN COMMON MAY MAINTAIN ACTION ON THE CASE against his co-tenant for flowing the land owned in common by means of a dam erected upon other land, for such act tortiously deprives the former of the use of the property, and is in the nature of a destruction of the use for which it was intended.

MAINTENANCE OF DAM AND UNINTERRUPTED USE of the water in a stream for twenty years furnish conclusive evidence of a right to continue the dam and the use of the water, to the same extent that it was used during that period; but the existence of a portion of a dam for that length of time furnishes no evidence of a right to use all the water at that point.

PARTY CAN NOT JUSTIFY COVERING UP DAM erected by another, on the ground that it is a nuisance obstructing the use of a public highway.

CASE. The declaration alleged that the plaintiff was seised of a certain mill and mill privilege, situated in Meredith, and had a right to the use of the river to run in its natural channel from lake Winnipiseogee, for the use of his mill; that the defendant erected a dam on the river below the mill, and thereby caused the water to flow back upon the wheels, whereby the mill and mill privilege were rendered worthless. Plea, the general issue. There was a verdict for the plaintiff, and the defendant moved for a new trial. The other facts sufficiently appear from the opinion.

Lyford, Clarke, and Bell, for the defendant.

Christie and Bartlett, for the plaintiff.

PARKER, C. J. The title derived from Skinner to the plaintiff conveyed one half of a tract of land on the westerly, or Meredith side of the river, with one half of the mill and privilege alleged to be injured by the dam below, built by the defendant. It does not appear from the case when the plaintiff took his deed, but the mill was first built in 1828. Gordon was formerly owner of the other half, and his deed of December 10, 1831, conveyed that half to the plaintiff, with the exception of what Gordon had previously conveyed, by his deed to Batchelder, in August, 1830. By the deed to Batchelder, Gordon conveyed one half of so

much of the premises as the new dam, lately constructed at Batchelder's mills, should flow, with one half of two rods in width of the land along the westerly bank, etc., reserving his ownership of the sawmill standing on the premises, to use subject to the flowing of the dam, and to take it off at his pleasure.

The dam mentioned in this conveyance is understood to be the same dam mentioned in the declaration, and the deed conveyed the title to an undivided half of the land, and gave the right, so far as Gordon could give it, to do what is the subject-matter of the complaint in the present case. But Gordon being the owner of only one undivided half, could convey no interest or easement in the other half, and his deed in no way purports to convey any such interest, or to give any license affecting it. The operation of the deed was to constitute Batchelder a tenant in common with the plaintiff, of the strip of land two rods in width lying along the river, and also of that portion of the land which should be flowed, subject to the reservation by which Gordon had the right to use and appropriate his half of the mill. And as the defendant was a joint purchaser with Batchelder, and paid one half of the consideration, he may also be considered as a tenant in common by means of a resulting trust for his benefit, notwithstanding the deed was taken to Batchelder alone: *Scoby v. Blanchard*, 3 N. H. 170; *Prichard v. Brown*, 4 Id. 397 [17 Am. Dec. 431]; *Page v. Page*, 8 Id. 197. The question which arises on these facts is, whether one tenant in common is authorized, by means of a dam erected upon other land, to flow the land owned in common, without the license of his co-tenant; and if not, whether an action on the case can be maintained against him for the injury.

To a certain extent, the act of one tenant in common is regarded as the act of all the tenants, and he may have the entire actual possession of the common property without being a wrong-doer. Thus trespass can not be maintained in favor of one tenant in common against another, for a mere breaking and entering of the close, and taking the whole profits: *Fairclaim v. Shackleton*, 5 Burr. 2604; *Higbee v. Rice*, 5 Mass. 351 [4 Am. Dec. 63]; *Keay v. Goodwin*, 16 Id. 4. So a tenant in common may cut down trees of a proper age and growth to be cut: *Martyn v. Knowllys*, 8 T. R. 145. And may convert a chattel to its general and profitable application; as a whale into oil, or wheat into flour: *Fennings v. Lord Grenville*, 1 Taunt. 241.

But one tenant in common is not authorized to exclude another from the possession of land owned in common, or to de-

stroy a chattel, or to sell the whole of it. If one tenant in common of land oust his co-tenant, the latter may maintain trespass: 3 Wils. 118; *Erwin v. Olmstead*, 7 Cow. 229; *Brackett v. Norcross*, 1 Greenl. 89. If he destroy personal property owned in common, trover lies: Co. Lit. 200, a. So if he sell the entire property: *Wilson v. Reed*, 3 Johns. 175; *Farr v. Smith*, 9 Wend. 338 [24 Am. Dec. 162].

It has been said, "if one tenant in common take all the chattels personal, the other hath no remedy by action, but he may take them again:" Co. Lit. 200, a; and that one can not bring trover against another for a thing still in his possession, for the possession of one is the possession of both: 2 Saund. 47, f,¹ note; and this is true of a mere taking and continuance of possession. But there may well be a question, whether an action will not lie if one tenant in common of a chattel, owned and held for use, appropriate it entirely to his own use, and refuse to permit the other to have any possession or use of it: 8 T. R. 145. "There must be a destruction of the chattel, or something equivalent to it, or something which amounts as it were to an ouster, so that a tenant in common who commits it can not account:" 1 Taunt. 249.² There must be some act unauthorized by the ownership in common, and in violation of the just rights of the other party. And when such an act is done, how is the party justified or excused by the fact that he was a tenant in common? In *May v. Parker*, 12 Pick. 34 [22 Am. Dec. 393], the court held that where a person being sole owner of one mill, and tenant in common of another, uses in his several mill more water than appertains to it, to the injury of the mill owned in common, a bill in equity may be maintained. It is not decided in that case that an action at law would not lie, but only that the remedy at law, if one existed, would be inadequate for the redress of the wrong done.

A question has been made, whether the plaintiff, as tenant in common, can have a remedy at law, for the flowing of the common property. The general rule is that tenants in common must join in personal actions for a wrong done, by a stranger to the common property: Co. Lit. 198, a; *Wilson v. Gamble*, 9 N. H. 75. But where the injury is separate, they may have several actions: 2 Wm. Bl. 1077.³ And the rule that they must join, can not apply where the injury is done by a co-tenant.

The cases before cited show that trespass and trover may be maintained by one co-tenant against another. In *Martyn v.*

1. *Wilbraham v. Snow*.

2. *Fennings v. Lord Grenville*.

3. *Cutting v. Derby*.

Knowllys, before cited, Lord Kenyon said: "If one tenant in common misuse that which he has in common with another, he is answerable to the other in an action as for a misfeasance." In *Chesley v. Thompson*, 3 N. H. 9 [14 Am. Dec. 324], case was maintained against a tenant in common of a mill, for so negligently keeping his fire, while he had the sole use of the mill, that it was burnt and destroyed. And in *Blanchard v. Baker*, 8 Greenl. 253 [23 Am. Dec. 504], the court held that one tenant in common might maintain case against his co-tenant, for diverting the water from their common mill, for separate purposes of his own. The act of the defendant in flowing the common property in this case, if without right, is not a mere entry and possession, as a tenant in common, subjecting him to account for the profits, but it is an act which tortiously deprives the plaintiff of the use of the property, and is in the nature of a destruction of the use for which it was intended. The remedy, therefore, is well sought, if the act of the defendant is not justified.

The next question is, whether the defendant can justify the act complained of, by his ownership of the land on the Gilford side of the river, opposite the mill and land in which the plaintiff claims an interest, and by the erection of a mill there in 1803 or 1804, and the extension of the dam across the river, in the manner mentioned in the case. The title of the defendant, on that side of the river, derived from Skinner and others, bounds him on the river, and of course extends to the thread of it. But this would not authorize him, or any one under whom he claims, to extend a dam across the river, and appropriate the whole water to his own use, as first occupant; nor to flow the land on the Meredith side, by means of a dam erected below: *Gilman v. Tilton*, 5 N. H. 231; *Tyler v. Wilkinson*, 4 Mason, 400; 13 Johns. 212.¹

Nor can the defendant justify flowing the plaintiff's mill and land, by reason of the erection of the mill and dam on the southerly, or Gilford side of the river, more than thirty years since. If that mill and dam had continued for a period of twenty years, the continuance of the dam, and the uninterrupted use of the water, for that period, would have furnished conclusive evidence of a right to maintain the dam, and to use the water, to the extent of the use for that period. Whether such circumstances would have furnished evidence of a general grant to use the water of the river at the mill on the southerly side, or whether

1. *Vandenburgh v. Van Bergen*.

the owner of the land at the northerly end of the dam might have erected a mill there, and have used the dam, such as it was—or have made additions to it, for his own benefit, and have used the residue of the water, or any part of it—we have not found it necessary to inquire. It appears from the case, that a portion of the dam was carried away soon after it was built. A log was generally put across, afterwards, when the mill was used; but the mill itself was not used after 1819, and went to decay, for what reason does not appear. The fact that a portion of the dam remained more than twenty years, and still remains, furnishes no evidence of a right to use all the water there. That constitutes no appropriation of the mill privilege: 5 N. H. 231;¹ 4 Mason, 397.² A man may build a dam as high as he pleases on his own land. So long as he does not obstruct others in the enjoyment of their property and rights, they have no occasion to complain, nor does his dam, in such case, furnish any evidence of a grant to him. It is the adverse use of the stream which furnishes the evidence of the right to interfere with the property of others.

If the erection and continuance of a mill and dam might have furnished evidence of a right to flow the plaintiff's land, by means of that dam, it would not follow that the defendant could flow the plaintiff's land by means of a dam erected at another place below. There might be incidental advantages to the owners on the northerly side, in having a dam at the place where the old mill stood, which would induce them to make a grant of the right to maintain such dam, and to flow the land by it, but which would not accrue from the dam erected at Batchelder's mills; and if the right is maintained by the presumptive evidence arising from occupation for more than twenty years, it might perhaps be limited to the maintenance of a dam at the same place, or of one which should flow in the same manner; but it is not necessary to pursue this inquiry.

It appears farther, that rafts of logs and of boards have, for thirty years or more, passed up and down the river; and it is alleged that the river is a common public highway, and the plaintiff's dam an obstruction and nuisance. But this can not justify the defendant in flowing the plaintiff's undivided half of the land, nor in covering with water the dam there erected. In *Hart v. The Mayor etc. of Albany*, 9 Wend. 571 [24 Am. Dec. 165], a query is made, whether an individual, without being specially aggrieved, has a right to abate or remove a nuisance in

1. *Gilman v. Nilton*.

2. *Tyler v. Wilkinson*.

a public river. If the defendant had a right to interfere on that ground, it was by abating the nuisance: *Arundel v. McCulloch*, 10 Mass. 70; *Wales v. Stetson*, 2 Mass. 143 [3 Am. Dec. 39]; not by covering it up, and the plaintiff's land with it.

Judgment for the plaintiff.

TRESPASS BY ONE CO-TENANT AGAINST ANOTHER: See *Porter v. Hooper*, 29 Am. Dec. 480, note 483, and the cases there cited. The principal case is cited in *Silloway v. Brown*, 12 Allen, 37; in *Wood v. Griffin*, 46 N. H. 237, and in *Kenniston v. Leighton*, 43 Id. 312, to the point that trespass *quare clausum fregit* is maintainable by one co-tenant against another for an actual expulsion or ouster from premises; and in *Great Falls Co. v. Worster*, 15 Id. 460, to the point that, if one co-tenant excludes another, the latter may have an action, and that one co-tenant can not flood the land of the other without the latter's consent.

DUKE v. FULLER.

[9 NEW HAMPSHIRE, 536.]

FUNDS OF A FREE MASON LODGE ACCUMULATED UNDER A BY-LAW providing that they should be used "for the good of the craft, or for the relief of indigent and distressed worthy masons, their widows and orphans," can not, on the dissolution of the lodge, by a vote of the acting members, be divided among themselves for their private use.

SUIT CAN NOT BE MAINTAINED AGAINST THE TREASURER of such lodge, by a member thereof, for his proportion of such funds.

ASSUMPSIT, brought by the plaintiff, a member of Bible Lodge Society, No. 27, in Goffstown, against the defendant, the treasurer of said lodge. Plea, the general issue. There was a verdict taken for the plaintiff, by consent, subject to the order of this court. The other facts sufficiently appear from the opinion.

Bartlett and Steele, for the plaintiff.

Farley, for the defendant.

UPHAM, J. It becomes important, in deciding the case before us, to determine the objects of the association known by the name of the Bible lodge. There is no suggestion that it had ever been incorporated. It appears, however, from the case as drawn, that the association had the ordinary officers of a corporation, such as treasurer and secretary; had funds belonging to it; had an annual meeting, or communication, in May of each year, and was governed by a code of by-laws.

By one of these by-laws it is provided, "that the furniture and funds of the lodge shall be considered as the joint and equal property of all the members, who shall, by a majority of the

votes, have the management thereof, for the good of the craft, or for the relief of indigent and distressed worthy masons, their widows and orphans." This provision is applicable to all the funds of the association, whether derived from bequests, assessments, contributions, initiation fees, or other causes; and it is quite clear that while such a by-law exists, it is imperative as to the mode in which the funds collected under it shall be appropriated; and it also admits of doubt whether it can be rescinded in any manner so as to authorize a different application of funds previously received.

What, then, is the purpose for which these funds were received? Were they received for charitable uses? This can hardly be denied. The words in the by-law referred to are similar to those in the statute of charitable uses, of 43 Elizabeth. The uses enumerated in the preamble of that statute, as charitable, and therefore sustained by law, are "gifts and devises for the relief of aged and impotent persons; for schools of learning, free schools, and scholars of universities; for the education and preferment of orphans, help of young tradesmen, and handicraftsmen; for relief or redemption of prisoners, and the aid or ease of any poor inhabitants," together with various other objects: 2 Fonbl. Eq., b. 2, pt. 2, c. 1; 2 Story Com. on Eq., sec. 1160.

The by-laws of the lodge appropriate its funds in promoting "the good of the craft, or for relief of indigent and distressed worthy masons, their widows and orphans." The good of the craft can only be understood to mean the furtherance of the general cause of freemasonry; and this surely can not have been effected by abandoning the institution entirely, and dividing its ancient funds among a few acting members; neither can it be contended that such distribution was made for the relief "of indigent and distressed worthy masons, their widows and orphans."

It does not appear how long the funds of the lodge had been in process of collection. The society at its dissolution consisted of but eight members, including the parties to this suit, and the funds exceeded two hundred dollars. It can hardly be supposed that this sum was received from these individuals. It had probably accumulated during a series of years, from the initiation fees and assessments of other members; and it could not have been contemplated that the members to whose immediate care for the time being this fund was transmitted, would by vote appropriate the whole to their private use. Such an appropriation was a breach of the specified object for which the fund was

raised, and a violation of the pledged faith of the society. Equally well might any eleemosynary association, or clearly public institution, the collections of which had been accumulating for many years, divide at any time their property among its acting members, in violation of the expressed design of their institution. Such a proceeding can not be sanctioned by any court, either of law or equity.

It may be asked, however, what shall be done with the funds or property of such an institution, if the members refuse to keep up their organization, and dissolve the association, as they have done in this instance? Such a dissolution can not be prevented. It is not only in the power of such an association, but of any body, duly incorporated, which was not created for the administration of political or municipal authority, to dissolve itself by its own assent. This has been repeatedly adjudged: 2 Kent Com., 2d. ed., 305; Ang. & Ames on Corp. 507.

But it by no means follows that the members of an association, holding funds in trust, or of a body incorporated for eleemosynary purposes, can, on such dissolution, appropriate its funds among themselves. Mere moneyed corporations, whose funds are owned solely by the stockholders, and are not holden in any manner for charitable or public use, may do this, but no others. The association may be dissolved, but the trust fund is not, therefore, to be either distributed or abandoned. It is an established maxim in equity, that no trust shall fail for want of a proper trustee. The funds of this and of any other charitable institution, may, therefore, be saved to carry out the original purposes and wishes of the donors or contributors. "Whenever funds raised for charitable purposes are committed to private individuals, or to a corporation, if there be any abuse or misuse of the same, a court of equity will interpose, at the instance of the attorney-general, or the parties concerned, to correct such abuse; and the court may go the length, in cases of gross mismanagement, of taking the funds away, and committing the administration of them to other hands;" and the same course would be pursued in case of an abandonment of them by a dissolution of the association: 2 Story Com. on Eq. 435, sec. 1191, and authorities there cited: 2 N. H. L. 75.

The division of the funds in this case was illegal and void; and as this suit is brought by the plaintiff on the ground that being a member of the association at the time of the dissolution, he is entitled to his distributive share of such funds, it is a suit without legal foundation, and can not be sustained. No one can

rightfully claim such share as his individual property, notwithstanding the vote of the members. The funds should still be holden for their due application; and this application can be enforced whenever the proper proceedings are instituted for this purpose. There must, therefore, be

Judgment for the defendant.

FRARY v. FRARY.

[10 NEW HAMPSHIRE, 61.]

WIFE MARRIED IN THIS STATE MAY LAWFULLY RETURN to and reside in it, upon being deserted by her husband in another state, where they had their domicile.

COURTS OF THIS STATE HAVE JURISDICTION TO DISSOLVE MARRIAGE for the adultery of the husband committed in another state, subsequent to his desertion of the wife and while she was an actual resident of this state, the marriage having been contracted here.

LIBEL for a divorce. The opinion states the case.

Wilson, for the libelant.

PARKER, C. J. In *Clark v. Clark*, 8 N. H. 21, we decided that we could not grant a divorce for the adultery of the husband committed while the parties had their domicile in Vermont, notwithstanding the marriage took place in this state, and the husband came here and committed the offense. In such case, by the general rule, the jurisdiction of the matter of divorce does not attach to the place of the marriage, or to the place where the adultery was actually committed, but to the place of the domicile; and both husband and wife were, in that case, legal residents in Vermont at the time the alleged cause of divorce accrued.

But in this case the libelant, at the time of the adultery of the husband, was actually and properly a resident in this state, and had been so for a considerable period. Prior to her marriage she was an inhabitant of this state; the marriage was contracted here; and the parties afterwards resided here. They subsequently removed to New York, and had their domicile there; but when the husband deserted the wife, leaving her without adequate provision for her support, she had the right to return to her friends here, and to provide for her own maintenance. After her return under such circumstances, having lawfully come to reside here, she was entitled to the protection of our laws; and a violation of the marriage covenant having subsequently oc-

curred, she, as a legal inhabitant, may well appeal to those laws for redress. We have no doubt, under these circumstances, that we have jurisdiction to dissolve the marriage, which was contracted here, notwithstanding the parties afterwards had their domicile in New York; because, after the desertion of the husband there, and the lawful return of the wife here, her residence in that state was terminated.

We lay out of the case the fact, appearing in the evidence, that the husband after her return came here also. It does not appear that he remained here, nor that he had any domicile in Vermont, where the adultery was committed. So far as the evidence goes, it shows him to be a transient person. If, however, it had appeared that subsequent to his desertion, and her return here, he had his domicile in Vermont, it may well be doubted if that could alter the case. He never attempted to re-assume his marital duties after his desertion in New York. Whether a wife, married as well as deserted in another state, might thereupon come to reside here, and avail herself of our laws to obtain a divorce for an offense of the husband committed out of this state, subsequent to the time she came here, is a question which may deserve consideration when a case of that character presents itself.

Divorce decreed.

DIVORCES, WHEN GRANTED FOR CAUSES THAT AROSE WITHOUT JURISDICTION of the state in which they are sought: See *Harteau v. Harteau*, 25 Am. Dec. 372, note 377, and the cases there cited. The principal case is cited in *Leith v. Leith*, 39 N. H. 33, and in *Greenlaw v. Greenlaw*, 12 Id. 203, to the point that divorces in that state are not granted for causes that arose before the parties became domiciled there. And also in *Payson v. Payson*, 34 Id. 521, to the point that a libellant must be a *bona fide* resident of this state when the divorce is granted, in order to give the court jurisdiction.

WIFE MAY HAVE DOMICILE DIFFERENT FROM THAT OF HER HUSBAND, where he has deserted her: *Harteau v. Harteau*, 25 Am. Dec. 372, note 378.

CASES
IN THE
SUPREME COURT
OF
NEW JERSEY.

STATE v. LASH.

[1 HARRISON, 380.]

ADULTERY AT COMMON LAW can be committed only upon the person of a married woman; illicit carnal intercourse by a married man, with a woman not married, is not sufficient to constitute this crime.

THE COMMON LAW IS THE CONSTITUTIONAL GUIDE of this court in determining what constitutes adultery, and in case of a conflict between it and the canon law, the former will prevail.

ON INDICTMENT FOR ADULTERY defendant can not be found guilty of fornication.

INDICTMENT for adultery. The facts are stated in the opinion.

J. W. Miller, for the defendant.

J. Moore White, attorney-general, for the state.

By Court, FORD, J. An indictment was found by the grand jury of the county of Morris, against Robert Lash, that he, being a married man, committed adultery with B., a single woman. This indictment being brought into this court by certiorari, the defendant moves that it may be quashed, because the facts on the face of it amount only to fornication, for which he might be lawfully indicted, but do not amount by the common law, to the crime of adultery. If a married man have illicit intercourse with a single woman, there is no doubt but he is guilty of adultery, according to the ecclesiastical or canon law of the church; but according to the common law, which is our constitutional guide, I hold it to be demonstrable, that adultery can not be committed with a single woman; that an illicit intercourse with a single woman can only produce a *nullius filius*, a bastard in law, who

possesses no inheritable blood, is incapable of succeeding to any man's inheritance, and whom she can not impose as a legitimate heir upon her husband, for she has none, and consequently can not occasion an adulteration of issue.

Neither fornication nor adultery were indictable offenses at the common law; they were held to be only private wrongs, for which the aggressor was answerable in a civil action, for exemplary damages; and this continued to be the case, except for one short revolutionary period of time in England, until our own legislature made them indictable offenses. For these enactments, we need go no further back than the year 1799, Revised Laws, 248; the fourteenth section whereof enacts, "that every person who shall commit adultery, shall be punished by fine not exceeding one hundred dollars or imprisonment not exceeding six months;" and the fifteenth section, "that every person who shall commit fornication, shall be punished by a fine of fourteen dollars;" not defining what shall constitute adultery, or what shall constitute fornication; leaving each to be determined by reference to the common law, as I apprehend; but ever since the date of that statute, at least, which is upwards of forty years ago, professional men have differed about what adultery is; and what seems very surprising is, that the question has never been before the supreme court, for adjudication, till the present time. This difference arose from opinions being founded on codes of law materially different from each other; one side relying on that code which is called the common law; the other side on a code denominated the canon law, compounded of the civil or imperial law of Rome, interwoven with the laws of the church, and introduced by the pope and his clergy into their ecclesiastical courts. Each of these codes held a different doctrine from the other, about what constituted adultery; and we must first settle by which of these codes, we, sitting as a court of common law, are to be guided; and I have no hesitation in saying that the common law is our constitutional guide.

The canonical law is not adopted in the written constitution of New Jersey. The popish clergy, those zealous abettors of arbitrary power, during the time they sat as the only judges in the ecclesiastical courts and the court of chancery, naturally introduced into them, the imperial laws of Rome; not only as to the mode of proceeding without a jury, but the maxims and principles established in the rescripts of emperors, decrees of general councils, opinions of the ancient fathers of the church, and decretal epistles of the popes. But the common law was so

favorable to the liberties of the nation, and consequently dear to the people, that their utmost zeal could never introduce these principles into the courts of the common law; wherefore refusing to sit any more as judges in the temporal courts, but retaining the court of chancery and ecclesiastical courts in their own hands, they so enlarged their jurisdictions beyond the immediate cares of religion, as to engross the cognizance of many secular concerns; such as the probate of wills, granting letters of administration and guardianship, the settlement and distribution of the estates of persons deceased, deciding on the legality of marriages, and the power of divorcing for adultery. In settling what should constitute this charge, they deemed it almost heresy to take the common law for their guide, which law limited it to criminal intercourse with another man's wife, exposing his issue to adulteration, and a spurious heir to succeed by law, at his death, to the inheritance of his estate; whereby it was strongly connected with the law of landed estates, and the doctrine of descents. But these worldly and temporal considerations were quite below their ecclesiastical notions. They decreed under the authority of the pope as their sovereign leader and supreme head, that marriage was a holy sacrament, as holy as baptism and the memorial of our Savior's death; that its vows were holy, and the breach of them, was adultery in any person who had once assumed them. Therefore they held that if a married man had illicit intercourse with a single woman, the violation of his vows made him guilty of adultery; for which cause his wife might sue for divorce; and this doctrine of the ecclesiastical law has prevailed in chancery from those popish times, to the present day. It views the act merely in the light of a sin; a breach of vows, assumed by the church to be holy, and without any reference to the inheritance of estates, or the laws relating to the purity of heirship and descents. If it were necessary to vindicate the common law, it would be easy to show the fallacy of the foundation on which the opposite doctrine rests; for the assumption that marriage is a sacrament which renders its vows all holy, is entirely a papal superstition; it being only a solemn civil contract, and so acknowledged by our laws. If a single man have unlawful intercourse with a married woman, whereby her husband may be imposed upon by a spurious heir, he is guilty of adultery, by the common law; but as he being single, had never assumed the marriage vows on himself, it is not easy to see how her violation of them, can be adultery in him, according to the ecclesiastical law. Moreover, if a husband sues for divorce on

account of the infidelity of his wife, she may retort the charge upon him; and if they are both found guilty, the ecclesiastical law does not grant a divorce to either of them.

Now suppose a court of common law were to decide, that if A. commits adultery with the wife of B., and in retaliation, B. commits adultery with the wife of A., that the act of one shall neutralize the act of the other, and form a kind of legal set-off, so that neither of them shall maintain an action for adultery; such a decision would astonish the world. It is needless, however, to compare the two codes together, in order to show which has the greatest consistency of principle, for the common law has been solemnly adopted for our guide, by the constitution of New Jersey; and all I need show, is that according to the fixed principles of this constitutional law, adultery can be committed only with a married woman. It does not punish the sin of adultery, or fornication, either by penances or excommunication; it leaves that to the upbraidings of a guilty conscience, or to be dealt with by religious judicatories; but considers them as signal and gross violences done to personal rights, and gives redress by a civil action, in which the parties injured are entitled to exemplary damages. In cases of fornication, it gives such action to the parent or master, of the daughter, or servant, that is seduced, and for adultery an action to the husband, and to him alone. There never was an action for adultery known to be maintained at the common law by any but a husband; showing that the offense can not possibly be committed with any other than a married woman. The heinousness of it consists in exposing an innocent husband to maintain another man's children, and having them succeed to his inheritance. This is the common law doctrine of adultery, transmitted to us from the earliest times, by those venerable sages, who gathered it from existing precedents, records, and decisions, at the times they respectively wrote. I shall cite only a few of them, because the records and decisions referred to by them, have been so faithfully consulted and the testimony of those sages examined and condensed with such admirable precision, in the imperishable Commentaries of Blackstone, that it is almost vanity to look behind his work. More definite language can not be selected for confining adultery to illicit intercourse with a married woman, than his following definition of the offense: "Adultery, or criminal conversation with a man's wife." The woman must not be single; she must be another man's wife; and whoever, married or single, has illicit intercourse with her, becomes guilty of adultery. The

text is in 3 Bl. Com. 139, and is so clear of ambiguity as to challenge any attempts to evade it.

Let us next see how Buller, in b. 1, c. 6, of his introduction, coincides with the Commentaries; he says: "The action of adultery lies for the injury done to the husband, in alienating his wife's affections, destroying the comfort he had from her company, and raising children for him to support and provide for." Bull. N. P. 26. He represents adultery to be an injury to a husband, exposing him to have children of another man, raised for him to support, while he lives, and to provide for, at his death. This injury to a husband is made the very gist of adultery. No one will suppose him to mean that the alienation of the wife's affections, and loss of comfort in her company, constitute the offense; the alienation of her affections might accrue from the malignancy of his own temper, and the loss of comfort in her company, from lunacy; he does not mean that any malignancy of temper, or that lunacy or any other sickness amounts to adultery; they are only aggravations that may or may not attend the offense; therefore the essence of adultery at the common law without which the action can not be maintained, is that criminal intercourse with a married woman, which exposes her husband to support and provide for another man's issue. Some ingenious casuists, forgetful of their legal law, pretend if this be a true principle, that an action for adultery could never be maintained, where the man's wife was past the age of procreation, supposing that there is such an age; whereas, by the common law, the possibility of issue is commensurate with life; the Commentaries declares it thus: "A possibility of issue is always supposed to exist in law, unless extinguished by death, even though the donees be each of them a hundred years old." 2 Bl. Com. 125. Let us next take up Bacon's Abridgment, that famous repository of the common law, wherein he draws the distinction between fornication and adultery so clearly as to admit of no equivocation. He says: "Fornication is unlawful, because children are begotten without any care for their education; but adultery goes further, it entails a spurious race on a party for whom he is under no obligation to provide." Bac. Abr., Marriage and Divorce, 569.

This is the circumstance on which adultery depends at the common law; its tendency to adulterate the issue of an innocent husband, and to turn the inheritance away from his own blood, to that of a stranger. If the woman be single, her incontinence produces none of this evil; her issue takes away no man's

inheritance; it can be heir to nobody, and the burden of its support is cast by law upon herself and the partner of her guilt. Even if her paramour be a married man, it is not adultery, for the same reason; the bastard can not succeed to his inheritance; neither does it adulterate the issue of his wife; it can never succeed to her inheritance in case she leaves any to descend. She may adulterate her husband's issue; the law can not defend him against her; his only reliance is on her virtue; but he can never adulterate hers. This is the reason why a married woman, if her husband become unfaithful, can not maintain an action of adultery against him or his paramour, in any of the common law courts; such infidelity does not adulterate her issue, nor his own; it brings no one's inheritance into jeopardy, nor can it possibly produce a spurious heir to disturb the descent of real estates. If she wishes it to be treated as adultery in her husband, she must sue him by a short petition to the court of chancery, which, governed by the ecclesiastical law, allows adultery to consist in the breach of marriage vows; and there she may have a decree of divorce and allowance of alimony. But courts of common law adhere to the maxim so rigidly, that adultery is criminal conversation with a married woman, so prejudicial to the rights of a husband, that it will appear by the records of their courts from time immemorial, that none but a husband has ever maintained an action for it. Nay, they require the proof of his being such, to be of the most rigid kind; they will not receive for evidence of it, universal reputation, hearsay, and cohabitation, as they will in all other cases save bigamy alone, but insist upon direct evidence of the marriage. The action to be maintained requires incontestable proof of the woman it was committed with, being a married woman; if there is a failure on this essential point, the action will be dismissed; for the idea of adultery with a single woman, stands opposed to the whole character and genius of the common law. The nature of a penal statute forbids its words to receive a broader interpretation than the sense necessarily requires; penalties are not to be liberally extended by judicial construction; the rule is that they are to receive a strict construction if it is almost an imperious one, and the word adultery having a definite and fixed meaning at the common law which is to be our guide, a broader meaning is not to be sought for it in the civil or ecclesiastical law, or in any laws whatever, foreign to our constitution.

I will barely add that adultery at the common law, is limited to criminal intercourse with a married woman, both by Swift

and Reeve, who are among our most eminent American commentators, and that I am acquainted with no treatise on the common law, English or American, to the contrary. Whether its regulation on this point, was borrowed at some early age, from the Levitical law, which the early dispersion of the Jews carried into various parts of Europe, I am not able to say; but certain it is, that this wide distinction between criminal intercourse with a married woman, and a single woman, is emphatically settled in the Levitical law; the former being punished with death, while the latter was only a fine: See Levit., c. 20, v. 10, and Deut., c. 22, v. 22-28. On the whole, I am clearly of opinion that the offense described in the indictment, is not adultery; it amounts only to fornication; for which the defendant should have been indicted; and on this ground the indictment must be quashed. The defendant could not be found guilty of fornication on an indictment for adultery, without being misled as to the charge against him intended to be proved. No impurity of description is requisite on the record in either case; it is sufficient to charge that at a certain time and place, the defendant, with such a person, adultery or fornication did commit.

HORNBLOWER, C. J. Justice Ryerson, whose attendance here is prevented by sickness, has written an opinion against the motion to quash this indictment.

I have prepared an opinion, which it is unnecessary to read, according with that of Justice Ford. This question has never before been determined in this state, I believe; although the law has, ever since the year 1704, provided a punishment for the offense. In Pennsylvania, is a similar law on which there has been made a different construction. It has there been decided, that the criminal connection of a single man with a married woman, is not adultery in him. An unmarried defendant can not be convicted of adultery, although the other party should be married: 2 Dall. 124; S. C., 1 Yeates, 6.

WHITE, J., gave no opinion, having argued the case as attorney-general.

DAYTON, J., was not on the bench when this case was argued; and gave no opinion.

Indictment quashed.

ADULTERY AND FORNICATION WERE NOT INDICTABLE AT COMMON LAW:
Anderson v. Commonwealth, 16 Am. Dec. 776. Accusing the wife of solicit.

ing another to commit adultery with her is libelous; and soliciting another to commit adultery is a high crime and misdemeanor under the laws of Connecticut: *State v. Avery*, 18 Id. 105. The mode of alleging adultery is considered in the note to *Christianberry v. Christianberry*, 25 Id. 99. See *Commonwealth v. Call*, ante, 284, and note.

SERGEANT AND HARRIS v. STRYKER.

[1 HARRISON, 464.]

ASSUMPSIT FOR MONEY HAD AND RECEIVED can not be maintained to recover the amount of a reward due the plaintiff, against the person to whom such reward, through fraud or mistake, has been wrongfully paid.

THERE MUST BE SOME PRIVITY existing between the parties in relation to the money sought to be recovered, in order that assumpsit may be maintained.

MONEY SOUGHT TO BE RECOVERED upon an implied promise, must, in this action, be either the identical money previously in the possession of plaintiff, or the proceeds of some property to which the plaintiff is entitled.

ASSUMPSIT. The opinion states the facts.

J. S. Green and Hartwell, for the plaintiffs.

W. Thompson, for the defendant.

By Court, HORNBLOWER, C. J. The facts of this case are shortly these. Sheriff Jones, of Hunterdon, had offered a reward of fifty dollars for the apprehension of a prisoner who had escaped from the jail of that county. Stryker, the defendant in certiorari, arrested the prisoner and lodged him in the jail of Somerset county, for safe keeping, until he could give information to Sheriff Jones, of his apprehension. The next day, Stryker proceeded to Flemington, to inform the sheriff that he had arrested the prisoner, and to get the reward; when he discovered that Sergeant and Harris, the plaintiffs in certiorari, had been to the sheriff, and represented to him that they had taken up the prisoner, and claimed the reward, and that the sheriff had paid it to them. Stryker thereupon sued Sergeant and Harris, before a justice of the peace, for the money so received by them, of the sheriff, as for money had and received to his use; and recovered judgment against them, for the same. From that judgment Sergeant and Harris appealed, and the court of common pleas affirmed the judgment of the justice. On the trial below, Jones, the sheriff of Hunterdon, having been first released by Stryker, was examined as a witness and proved the payment of fifty dollars to Sergeant and Harris, but added, that he did not

pay the money to them, for the plaintiff, nor on his account, that Sergeant and Harris claimed it as their own, and he paid them the money, supposing them to be entitled to it.

Three questions were made by the counsel on the argument of this cause: 1. Whether Jones was a competent witness? 2. Whether Stryker by releasing Jones, did not give up his right to the reward, if he ever had such right? and, 3. Whether the plaintiff below was entitled to recover in this action, seeing that the money was paid to and received by the defendants, as their own and for their use?

1. That sheriff Jones was a competent witness, either with or without a release, there can be, I think, no doubt. The release however removed all objection, if any really existed.

2. The plaintiff (Stryker), by releasing the sheriff, has precluded himself from ever resorting to him (as he otherwise might have done) for the promised reward; but how such release can inure to the benefit of the defendants, if they have money in their hands belonging to the plaintiff, it is not easy to conceive. There is certainly nothing in this objection. But

3. Whether the plaintiff under the facts in this case, is entitled to recover in this action, is a more serious question. That Stryker, upon the evidence in this case, was alone entitled to the reward, there can not, I think, be a reasonable doubt; and if he had sued Sheriff Jones, nothing in my opinion could have prevented his recovery. He has thought proper, however, to pursue the money, in the hands of the defendants, as money received by them to his use; and whether he can recover remains to be seen: I fear he can not.

The action of assumpsit for money had and received, is undoubtedly a favored and highly beneficial one. It is justly compared to a bill in equity; because it lets in both parties, plaintiff and defendant, to all the grounds of complaint on the one side, and of excuse and allowance on the other, which are consistent with the principles of equity and good conscience—nevertheless, we must not extend it to cases, where a court of equity itself, if the plaintiff was at liberty to go there, would not entertain a bill, and give the relief sought for: *Straton v. Rastall*, 2 T. R. 370, *per* Buller, J. Broad and extensive as this action is, it has limits, beyond which it ought not to go; and the great difficulty is, to prescribe those limits, and make them out by such specific and perceptible lines, as leaves the mind in no doubt or perplexity. To say, that it lies to “recover back money which ought not to be kept”—“for money, which *ex equo et bono*,

the defendant ought to refund"—or "for money which the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity, to refund," or "for money got through imposition," or "extortion," or "oppression," or by "mistake," or "by an undue advantage taken of the plaintiff's situation," is after all, dealing in generalities which afford us no specific rule, by which to test any particular case.

Notwithstanding the universality of the expressions used in the books on this subject, there is and must be in truth and justice, a limit to this action. It can not be that every person having a legal demand and a right of action against a third person, is at liberty to abandon his suit against such person, and by a suit against me for money had and received, compel me to litigate with him and establish my right to moneys I may have received from his debtor.

Suppose in the present case, that Jones, instead of voluntarily paying the fifty dollars to Sergeant and Harris, had denied their right to it, and refused to pay them, and that thereupon they had sued him, and recovered the money by judgment and execution at law, after a full and fair trial; will it be pretended, that Stryker, because he sets up an exclusive claim to the reward, instead of looking to the sheriff with whom he contracted, may at his own election, or by the suggestion of the sheriff, turn round and sue Sergeant and Harris, and thus, for the sheriff's benefit, compel them to try over again their right to the money recovered of him? And yet we must come to this, as it seems to me, if this action can be maintained: for the plaintiff's right of action, if he has any against these defendants, can not depend upon the question, whether Jones paid them without suit; or whether he resisted the payment until they compelled him to make it. Stryker's right to recover in this suit, if he has any such right, is not because the sheriff paid the money voluntarily to the defendants, nor because they had no right to it in fact; but because, they in fact, or by implication of law, received it for Stryker. That the sheriff did not pay the money to them, for Stryker, he expressly testifies; nor did they profess so to receive it; but on the contrary, claimed it as their own. If then the law can raise any implication that the defendants received the money to and for the use of Stryker, it must be on the ground that they practiced a fraud on the sheriff. But I can not well perceive how a fraud on one man, can inure to the benefit of another; or how a fraud practiced on the sheriff, can raise a promise to pay money to the plaintiff. If indeed, the money had been paid to

Stryker and left by him in a bag, or purse, with the sheriff for safe-keeping, and the defendants had got possession of it by falsehood and misrepresentation, then it would have been a fraud on the plaintiff: it would have been his money, and he might have pursued it in this form of action. But however unfair towards the sheriff the conduct of the defendants has been, they did not thereby get Stryker's money—they got Jones' money, and *ex equo et bono*, they ought not to retain it from him—they are bound by the ties of natural justice and equity to refund it to him; and in his favor, the law considers it in their hands, as money received by them to his use—not to the use of any other person. The money that Jones paid to Sergeant and Harris, was no more Stryker's money, than it was the money of any other creditor of Jones; and if he had owed me fifty dollars for a horse, he might with the same propriety have turned me over to them for so much money received by them to my use; because he had paid so much money to them by mistake, which they were not entitled to, and which if he had not paid to them, he would have paid to me. There must therefore be some principle running through the cases, by which it can be known when *indebitatus assumpsit* will lie for money had and received, and when it will not. The rule can not be arbitrary and the creditor at liberty to look to his immediate debtor, or to some other person who has got his debtor's money in his hands, at his election. Lord Mansfield says, in *Moses v. McFerlan*, 2 Burr. 1009, "that there are numberless instances in which this action lies, for money the defendant has received from a third person, upon a claim of title to it, in opposition to the plaintiff's right;" but he adds, "and which the defendant had by law, authority to receive from such third person." This is no doubt true, and I think all the cases relied upon are such as go upon the plaintiff's title to the specific fund; or where the third person having lawfully paid over the money, the plaintiff has no remedy against him; and this I think will be found to be the true criterion in such cases.

I have felt a strong desire for the sake of justice to sustain this action in this particular case; but upon much reflection and a careful examination of the authorities, I am compelled to give it up. At the very first step, we are met by the rule, that a chose in action is not assignable. As soon as Jones had paid the money to Sergeant and Harris, they not being entitled to it, it became money in their hands to his use, and he alone had a right of action against them for it. This can not be denied;

could then, that right of action be transferred by Jones to Stryker, or to any one else, without the consent of the defendants? Certainly not: 1 Com. on Con. 56; 2 Saund. Pl. and Ev. 209, 212, and cases there cited. In *Surtee et al. v. Hubbard*, 4 Esp. N. P. 203, Lord Ellenborough said, that where a party, entitled to money in the hands of another person, assigns over his interest in it to a third person, the mere act of assignment does not entitle the assignee to maintain an action for it. The debtor may refuse his assent; he may have an account against the assignor, and wish to have it set off; but if there is anything like an assent on the part of the holder of the money, it is otherwise. In that case, an assent was proved, and the plaintiff recovered. The cases of *Ward v. Evans*, 2 Ld. Raym. 928; and *Israel v. Douglass*, 1 H. Bl. 239, evidently go upon the same ground. The same principle was distinctly recognized by this court in *Congar v. McFarlan*, 2 Green, 370, and in the case of *Williams v. Everett et al.*, 14 East, 582, after a most elaborate argument and great consideration, it was held that money received on bills remitted to the defendants, with instructions to pay the plaintiff, was not money had and received by the defendants to the use of the plaintiff, until the defendants, by some act on their part, had recognized the right of the plaintiff to the money. The court say, in that case, page 597: "It will be observed that there is no assent on the part of the defendants, to hold this money, for the purposes mentioned in the letter; but on the contrary an express refusal to the creditor so to do. If, in order to constitute a privity between the plaintiff and the defendants, an assent, express or implied, be necessary, the assent can, in this case, be only an implied one, and that too, against the express dissent of the parties to be charged." This, however, the court held could not be done. Nor can it, I think, be done in this case; for the defendants instead of receiving the money, as the money of the plaintiff, or for his use, claimed and received it as their own, and wholly deny the plaintiff's right to it.

It will not do to rely upon the sweeping expressions used in many of the cases, upon this subject. In *Johnson v. Johnson*, 3 Bos. & Pul. 169, Lord Alvanley says: "In the case of *Moses v. McFarlan*, some principles were laid down, which are certainly too large—such as that, wherever one man has money, which another ought to have, an action for money had and received, may be maintained; or that wherever a man has an equitable claim, he has also a legal action."

In short there must be some privity existing between the parties, in relation to the money sought to be recovered in this action. This privity may be either express or implied. It is express, where the defendant has received the money as agent or bailiff for the plaintiff, or where he consents or agrees to appropriate money in his hands belonging to another, to the payment of the plaintiff, at the owner's request. But it can be implied only where the defendant has received money of the plaintiff, or money belonging to the plaintiff, by mistake, or fraud, or duress, or has come into possession of it *mala fides*, or on a consideration which has failed, or has tortiously converted the plaintiff's property into money. In other words, the money sought to be recovered in this action upon an implied promise, must either be identically the money of the plaintiff, of which the defendant has improperly possessed himself; or the proceeds of some property, or issuing out of some fund, or emoluments belonging to the plaintiff; and I think every well-considered case will be found to arrange itself under one or the other of these heads. In *Lamine v. Dorrell*, 2 Ld. Raym. 1216, the action was by a rightful administrator, to recover the proceeds of certain debentures which belonged to the estate of the intestate, and which the defendant, or wrongful administrator, had sold. The case of *Howard v. Wood*, 2 Lev. 245, Sir T. Jones, 126, and many others of the same kind, were brought by a rightful officer to recover the fees of office, that had been received by one who had held the office wrongfully; and these cases, it will be perceived, are like those mentioned by Lord Mansfield, in *Moses v. McFerlan*, where the defendant has received money from third persons in opposition to the plaintiff's right, and which by law, the defendant had authority to receive. But then it must be remembered, that the rightful officer had a right to those specific fees; and he could not recover them of the persons who had paid them to the officer *de facto*; for the officer *de facto*, while he continued to be such, had a right to demand, and lawful authority to receive, the emoluments of office.

The case of *Mason v. Waite*, 17 Mass. 560, was cited by the defendant's counsel. But far as that case goes, it does not help the defendant. There, the identical money of the plaintiff, was found in the possession of the defendant, who had got it unlawfully out of the hands of the plaintiff's agent. The case of *Hasser v. Wallis*, 1 Salk. 28, was also cited by defendant's counsel, but it does not sustain him. Hasser, the plaintiff, being a *feme-sole*, married Wallis, the defendant; he made a lease of her

land, and received the rent. She then discovered that Wallis had a former wife, and thereupon sued him in assumpsit for the money he had received. It was insisted that Wallis, having no right to receive, the tenant was not discharged; that therefore an action lay against the tenant, who might have his remedy over against Wallis. But the court held, that Wallis was visibly a husband, and the tenant discharged; at least the recovery against Wallis by the plaintiff, would be a satisfaction to her and discharge the tenant. It is plain that this case has no analogy to the one before us. Sergeant and Harris were not visibly entitled to the reward—payment to them was in no sense payment to Stryker; but the sheriff remained as much bound to him, as if he had thrown so much money into the fire. He did not pay them Stryker's money, but his own; and Stryker was neither bound to go after them for it, nor had he any more right to do so, than he would have had, if they had found Jones' pocket-book in the street, with fifty dollars in it. If a man goes to my debtor and personates me; and my debtor pays him, supposing he is paying me, it is clearly money paid to my use; and in such case I may, at my election, sue my debtor, or proceed against the impostor; for the money was paid to him for me, and he received it as mine. But my debtor can not give me a right of action against a third person, by paying him money which he claims a right to in opposition to me; and thus put it in my power to compel such third person to establish his rights as against his debtor, in a suit between me and such third person.

There is still another view which may be taken of this case, which I think is conclusive. It is admitted that Jones the sheriff may sustain assumpsit against the defendants for so much money had and received to his use; and this, in virtue of his general or absolute right of property in the moneys in question. If Stryker can maintain this action, it must be in virtue of his general right of property therein. Now, a right of action for the same property as well on contract as tort, may exist in distinct persons at the same time; but must it not be, where the contract is only implied, by virtue of some special right of property in the one, and general right in the other? An agent having some beneficial interest in the performance of a contract (as for commissions, etc.), may sue upon it. As a factor, broker, warehouseman, carrier, and others, and so may the principal: 1 Chit. Pl. 5; but they do not sue in the same right. It requires no argument to prove that an absolute and exclusive right to the same property, can not exist in distinct persons at one and

the same time by virtue of an implied contract: if this be so, how can a right of action grounded upon such an absolute and exclusive right exist in distinct persons at the same time? It can not be. If Jones the sheriff can sue for these moneys, Stryker can not.

Upon the whole, I am of opinion that the judgments below must be reversed. Stryker can not maintain this suit against the defendants below; they have got what does not belong to them; but that is no wrong to him. His right to the reward at the hands of the sheriff is as perfect as ever it was, and if he has released it it is his own fault or misfortune. I see nothing to prevent the sheriff from recovering the money he has paid the defendants, if in fact they did not retake the prisoner.

This is a long opinion, in a little matter, but the principles involved in the case seemed to require an examination into the grounds upon which this action is maintainable. The judgment, as well of the common pleas, as of the justice, must be reversed.

FORD, J., concurred.

WHITE and DAYTON, JJ., were not on the bench at February term, 1838, when this cause was argued.

Both judgments reversed.

ACTION FOR MONEY HAD AND RECEIVED is equitable in its nature: *McCrea v. Parmort*, 30 Am. Dec. 103. This action may generally be sustained by one person against another when the latter has money to which the former is, in equity and good conscience, entitled: *Lime Rock Bank v. Plimpton*, 28 Id. 236; *O'Fallon v. Boismenu*, 26 Id. 678. In a note to this last case, the different cases in this series upon this subject are cited.

CASES
IN THE
COURT OF CHANCERY
OF
NEW JERSEY.

ROBESON v. PITTINGER.

[1 GREEN CH. 57.]

AN INJUNCTION TO PREVENT A THREATENED OBSTRUCTION OF ANCIENT LIGHTS, will be granted by a court of equity, upon an application disclosing facts sufficient to justify the issuance of the writ.

ANCIENT LIGHTS WHICH HAVE EXISTED UNDISTURBED for over twenty years constitute an easement, and the owner of an adjoining lot has no right to obstruct them, particularly if he was also the owner of the building containing the ancient lights, at the time of its construction, and subsequently sold it to another.

PROCEEDING BY INJUNCTION TO PREVENT OR REMOVE A PRIVATE NUISANCE, is limited in chancery to those cases in which the nuisance complained of is prejudicial to some right which the other party had long previously enjoyed, and there must exist a pressing necessity, or the right must have been previously established by law, to entitle the party to call to his aid the jurisdiction of this court.

INTERFERENCE BY INJUNCTION WHERE THERE MAY ALSO EXIST A REMEDY AT LAW, is a matter, the policy of which in a court of chancery, must depend upon the particular circumstances of each case.

BILL for an injunction, praying that defendant be restrained from stopping plaintiff's lights by the erection of a building on an adjoining lot. Injunction issued. Defendant, without answering the bill, moved to dissolve the injunction. Case submitted to the chancellor upon this motion. The other facts, as set forth in the bill, are stated in the opinion.

I. H. Williamson, in support of the motion.

H. W. Green, *contra*.

PENNINGTON, Chancellor. The object of this bill is to restrain

the defendant from obstructing the light and air of a building belonging to the complainants. When the bill was presented, I granted the injunction with much reluctance, without notice ; and I did so from the pressing character of the case, as the defendant was actually at work in erecting the very obstruction complained of. I am now furnished with the briefs of the counsel of the respective parties, on a motion to dissolve the injunction upon the case made by the bill, and shall consider the same without prejudice as if the propriety of the interference of the court was now for the first time considered. I am not aware that this question has ever been decided in New Jersey, and it has caused me some anxiety to determine, not so much what views have been taken by other judges and in other countries, of the question, but what should be the course of decision in this state, and particularly in a country under a rapidly increasing state of improvement. It would seem unreasonable, that in those places where land is cheap, and the country thinly settled, a party, after being permitted to build his house and place his windows on the side adjoining the open field of another man, and especially after so long a possession as to presume a grant for that purpose, should have them obstructed by the erection of a wall or another building, when perhaps a little accommodation, by placing the new building a few feet further off, might work no injury to anybody ; and yet in populous cities, where land is very valuable, and it is the constant practice to place buildings side by side, the enforcement of the same rule might work great inconvenience and injustice. The difficulty, therefore, is to lay down one rule for all cases. Nor will it do to leave all parties to their remedy at law. That would be shutting up the doors of a court of equity, when the exercise of its legitimate powers is most needed. Cases might arise where damages would be no adequate compensation for the injury sustained, and the party unable to respond in damages at all.

The cases in the English courts are numerous, in which damages at law have been recovered for obstructing lights, and where injunctions have been issued to prevent such obstructions. The law is there well settled, and of long standing. In 1 Lev. 122, the case of *Palmer v. Fletcher*, there is an early and important decision on this subject. This was a case at law. A man built a house on his own lands, and then sold the house to one man, and the land adjoining to another, who obstructed the windows of the house by piles of timber. This house had been recently built, yet the action was sustained.

The judges differed as to what would have been the result had the man sold the vacant lot first, seeing the building had been recently erected; but all agreed, that if a stranger had owned the adjoining lands, he might obstruct the lights of a newly erected building, but not of an ancient building so that he has gained a right in the lights by prescription. In 1 Comyn's Digest, title, "Action on the case for a nuisance," A, the cases are cited in which actions on the case for a nuisance have been allowed. If a man erect a house or mill to the nuisance of another, every occupier afterwards is subject to an action for the nuisance.

In the case of *Rosewell v. Pryor*, 6 Mod. 116, the question was, whether in a declaration for stopping the plaintiff's lights, it was necessary to state the lights and messuage as being ancient, and it was held not to be necessary. In that case, Holt, C. J., says: "If a man have a vacant piece of ground, and build thereupon, and that house has very good lights, and he lets this house to another, and after he builds upon a contiguous piece of ground, or lets the ground contiguous to another, who builds thereupon to the nuisance of the lights of the first house, the lessee of the first house shall have an action upon the case against such builder, for the first house was granted to him with all the easements and the lights then belonging to it." This general principle is also stated in 3 Bl. Com. 217, where it is declared to be essential to the maintenance of the action, that the windows be ancient. The English cases are uniform on this subject; and Chancellor Kent, in 3 Kent Com. 445, declares in general terms, that "according to the English law, the owner of a house will be restrained by injunction, and he will be liable to an action on the case, if he makes any erections or improvements, so as to obstruct the ancient lights of an adjoining house."

In our own country, too, the same doctrines have been maintained; and I do not perceive that Chancellor Kent, in his commentaries above referred to, denies anywhere that the same rules of law on this subject apply in this country, except in a note, where he declares, that this common law prescription does not reasonably or equitably apply to buildings on narrow lots in the rapidly growing cities in this country, and upon the ground, that such was not the presumed intention of the owners of such lots. From all he says, I infer that he recognizes the general principles before stated as in force in this country, but exempts the case of city lots, from the necessity and reason of the thing,

as necessary for their advancement and continued improvement. The case of *Story v. Odin*, in 12 Mass. 157 [7 Am. Dec. 46], is a very clear and plain decision in our own courts. The property was situated in the town of Boston. The building was purchased of the town in 1795, and stood adjoining other lands of the town, with lights looking out directly upon this vacant land. In 1812, the town sold this vacant lot, and the purchaser built directly adjoining the plaintiff's building, and obstructed his lights. The court decided, that as the purchaser of the first building bought without reserving to the grantors any right to build on the adjoining ground so as to interfere with his lights, they could not, nor could their grantees, build so as to interfere with this right. As to the proper cases for the interference of this court to prevent private nuisance, the true rule, as it appears to me, is laid down in the case of *Van Bergen v. Van Bergen*, 3 Johns. Ch. 287 [8 Am. Dec. 511]. The chancellor says: "The cases in which chancery has interfered by injunction to prevent or remove a private nuisance, are those in which the nuisance has been erected to the prejudice or annoyance of a right which the other party had long previously enjoyed. It must be a strong and mischievous case of pressing necessity, or the right must have been previously established at law, to entitle the party to call to his aid the jurisdiction of this court."

From a careful examination of the cases, and the principles on which they are decided, I have come to the conclusion, that the same rules which have been established in the English courts, and in other states of the union, upon this subject, apply with the same force to us, and that there is nothing in our condition which can prevent their wholesome application: that, as a general rule, in a case of ancient lights, where they have existed for upwards of twenty years undisturbed, the owner of the adjoining lot has no right to obstruct those lights, and particularly so, if the adjoining lot was owned by the man who built the house at the time, and subsequently sold by him; and that, whether this court will interfere by injunction, or leave the party to establish his right at law, must depend on the particular circumstances of each case.

It remains to be considered, what is the case of the present complainants, and whether the injunction should be continued or not.

The property is situated in Belvidere, in the county of Warren, in this state, and was owned in fee, and possessed (as well the lot on which the house is built, as the adjoining one on which

the obstruction is about to be erected) as far back as the year 1797, by one Benjamin Sexton. The premises consisted of two lots, numbered 9 and 10, and adjoined each other. Sexton owning both these lots, which were each fifty-two feet in front and rising one hundred feet deep, in the year 1801 or 1802 erected the house in question, on lot No. 10 for his own residence, and placed the same on the line between said lots Nos. 9 and 10, and built on the end towards lot No. 9, six windows besides two in the cellar. These windows have continued, unmolested, to receive light and air from across this lot No. 9, until the recent attempt of the defendant to build his wall for a new house directly against the same. Benjamin Sexton died intestate, in the year 1806; and his heirs at law sold lot No. 10, with the aforesaid house, on the fourteenth of March, 1829, to one Smith, who afterwards sold the same to the complainants. The lot No. 9 was conveyed by two of the heirs of Benjamin Sexton to a third heir, on the twenty-eighth of April, 1828; and that heir again conveyed the same on the twentieth of January, 1831, to one Matthews; which lot has since been conveyed to, and is now the property of the defendant. On lot No. 9 there was also a building, standing back from the street about forty feet, and the front about eighteen feet from the nearest corner of the dwelling-house on lot No. 10.

Under these circumstances the defendant has commenced building the foundation of a house or shop, directly adjoining the house on lot No. 10, and so as to shut up the windows of that house. He is enjoined by this court from so doing, and the question is, whether that injunction should be dissolved. I am very clear the injunction ought not to be dissolved, and that upon all the authorities cited. The case is a very strong one. The builder of this house owned both lots at the time of erecting the building. The lights are ancient, having continued unmolested for thirty-five years. Lot No. 10, on which the house stands, passed out of the hands of the heirs at law of the original owner first; and there is no pressing necessity for this interference with the established rights of the complainants.

I am, therefore, of opinion, that the injunction was rightly issued in this case, and ought not to be disturbed.

Motion denied.

EASEMENT OF LIGHT AND AIR is presumed to accompany premises conveyed, so as to prevent the grantor or his assigns from afterward using adjoining land retained by him, in such a manner as to obstruct or disturb such easement: *Story v. Odin*, 7 Am. Dec. 46, in the note to which this subject is

exhaustively considered; see also *Mahan v. Brown*, 28 Id. 461. In *Gerber v. Grabel*, 16 Ill. 220, the principal case is cited in support of the principle there declared, that a prescriptive right to receive light and air over the land of another may result from twenty years' undisturbed enjoyment; cited also in *Berkeley v. Smith*, 27 Gratt. 898, to the point that such an easement is presumed to follow a grant of a portion of particular premises, the whole of which belonged at the time to the grantor; cited also in *Keats v. Hugo*, 115 Mass. 216, and declared to be of no weight as authority in that state. In *King v. Miller*, 4 Halst. Ch. 559, the chancellor denied an application for an injunction to restrain the defendant from building upon his premises, in such a manner as to obstruct the light of the complainant's ancient windows; and upon the general doctrine maintained in the principal case, that an easement of the character above referred to may arise by prescription, the chancellor said: "The owner of a lot has the election to build on it as he pleases. The owner of the adjoining lot has the same right. If the one who builds first chooses to build on the line, the adjoining owner has no means of preventing it. The loss of a right by lapse of time, from an act done and continued by another, can only be in cases where the party against whom the time is running, has some means of preventing the act or its continuance." It is to be observed that the question whether such a right would be implied in a grant was not presented in this case.

ACTION FOR OBSTRUCTING A VIEW can not be sustained unless founded upon express covenant: *Harwood v. Tompkins*, 4 Zab. 425.

It would seem from the foregoing citations from the same state, that while the principal case is nowhere by express terms overruled, yet its authority is certainly limited to the identical facts out of which it arose, viz.: a case where the two tenements had formerly belonged to the same person. In such a case a grant by such person may, perhaps, imply the right to have the lights remain as unobstructed as they were at the time of the grant.

INJUNCTION TO RESTRAIN OR ABATE A PRIVATE NUISANCE will usually be granted, when the necessity calling for its issuance is of an urgent and pressing nature: *Rosser v. Randolph*, 31 Am. Dec. 712; *Van Bergen v. Van Bergen*, 8 Id. 512.

MILLER v. MILLER.

[1 GREEN CH. 139.]

ADMISSION MADE BY A WIFE TO HER HUSBAND THAT SHE HAD COMMITTED ADULTERY, is not competent, unsupported by other proof, to sustain the charge, in an action for divorce upon that ground.

POSITIVE PROOF THAT CONFESSION OF GUILT WAS MADE THROUGH FEAR is not required upon the part of the wife, in order to negative the effect of such confession, but it may be inferred from her husband's general treatment of her.

PETITION for a divorce on ground of adultery. The facts are stated in the opinion.

Hartwell and I. H. Williamson, for the petitioner.

Frelinghuysen, for the defendant.

PENNINGTON, Chancellor. This is a petition for a divorce under the act of 1824. The cause alleged is adultery. The parties lived together, as man and wife, nearly seventeen years, and had a family of five children. The petitioner states, that shortly after his marriage, from a variety of circumstances, as well as from expressions made by his wife, he was induced to believe her unfaithful to him; but out of regard to his children, and from fear of the disgrace which would follow a public disclosure of her conduct, he continued to reside with her until the year 1828, when she made to him a confession of her guilt with a particular person, and he separated himself from her. The answer of the defendant denies the charge made in the petition, that she had been unfaithful to her marriage vows, but admits that on one occasion she did, from fear of her husband and threats of personal violence, confess that she had had criminal connection with the person stated in the petition, but that in the same conversation she again denied it, and has ever since and still does deny on her part any charge of criminal conduct. This answer is not under oath, and could not be under the provisions of our statute.

The whole case turns upon the truth or falsity of these charges, and of this issue the petitioner holds the affirmative. There is only one witness to the fact of adultery offered by the petitioner. That witness is Abraham Anderson. His evidence, if to be relied on, proves the case clearly and explicitly. He states, that in February, 1828, in the morning after breakfast, he saw the defendant, with William D. Williamson, in the act of adultery; that Mr. Miller was at home, and breakfasted with his family the same morning; that the house in which the act is alleged to have taken place, was about twenty or thirty feet from the dwelling-house; and that the road to the barn runs between the two. This witness is a laboring man, working sometimes in one place and sometimes in another: at one time in Somerset county, at another in Middlesex, and at another on the canal. At this time he is, and at the time of his examination he was, in the employ of the petitioner.

There is much in the testimony of this witness, standing alone, to create distrust in my mind. The story is of a most unnatural character. That these parties should have committed such an act, under such circumstances, in the daytime, when Mr. Miller was at home, and within twenty or thirty feet of the dwelling, where they must have been exposed to certain detection, is almost beyond belief; this, too, by a man who then lived with

the family as a teacher, and who, as we may suppose, could have secured a far more favorable opportunity for the accomplishment of such a purpose. He says they were in the house from fifteen to twenty minutes. The witness never communicated it to any person but a negro man, and gives as his reason for not telling Mr. Miller, that he had no witness but the negro. He never told Mr. Miller down to the very moment of his examination, though he made two memorandums of what he saw at the time, and kept them in his trunk. These memorandums are not exhibited by him. One he gave to the solicitor for the petitioner. This gentleman says that a paper containing the substance of what the witness had stated, was handed him; but still it is not produced. He was not bound, certainly, to do so; but to remove any imputation of fraud in the witness, it might legally and properly, under these circumstances, have been shown and offered to the opposite party to use if they thought proper. But I mean to draw no unfavorable inference from this circumstance. Why this man should have made two memorandums of this occurrence, and yet never have mentioned it to Mr. Miller, I can not understand. I confess my incredulity in such statements, especially from a witness, who from his own account of the matter, has no stronger claim to the confidence of the court. It would really be a strange case if this petitioner, who had entertained suspicions for seventeen years, could find no other person than this man—as it would seem a stranger—to make proof of misconduct in his wife.

William D. Williamson, the person with whom the adultery is alleged to have been committed, is examined as a witness by the defendant, and in the most positive terms denies the charges made. He uses this strong language on the subject: "Witness never had any improper connection with Mrs. Miller on the hearth, in the room, nor near it, nor in any other place, either by word, act, or deed." Thus the only positive evidence of the fact of adultery, is as positively denied by the very man charged with the act. There is gross and palpable perjury in the one or the other of these witnesses. There is no mode by which the evidence can be reconciled. I am not called upon to say, nor is there any way by which I can say, with whom the crime rests. I confess, my belief is, that the last witness speaks the truth. The whole story is improbable on the face of it, and is against that character for virtue, which Mrs. Miller appears from the evidence to have sustained among all her neighbors for her whole life.

An attempt is made to impeach Mr. Williamson, on the ground of his religious belief. Two reputable witnesses have clearly shown his disbelief of some of the leading doctrines of the church at this day, and that he ridiculed attending religious worship on the Sabbath. This evidence, while it affects the character of the witness in his general views on religion, and would constitute, as it seems it did with those gentlemen, a good reason against placing their children under his instruction, is not sufficient to destroy his competency as a witness. The conversation of the witness with Judge Howell was of a controversial character—a dispute about doctrines and tenets—and it is true that the witness exhibited a reckless feeling on these subjects. I do not find that he ever denied the existence of a God, or a future state of rewards and punishments. Upon evidence like this, with a witness stating so improbable a story, and that contradicted so explicitly, it can not be expected that I should be willing to ground a decree of divorce.

There is, however, another view to be taken of this case. The defendant has admitted her guilt to her husband. In her answer she declares that she did admit it, but it was done in fear of her husband, and under threats of personal violence, and that she recalled her words in the same conversation. The cause of the petitioner is evidently rested much on this admission. When asked by Captain Tuttle, at the time the articles of separation were signed, respecting this admission, the defendant did not deny it as she might have done at that time—for it rested between her and her husband alone—but frankly declared she had made the admission, but that it was false, and she would not make it again for her life. These admissions are not to be received, as a general rule, with much faith. They are competent when connected with other proof, but not without: *Betts v. Betts*, 1 Johns. Ch. 198. The reason assigned is, that there is great danger of collusion between the parties, or of confessions being extorted. They must and ought to be received with jealousy. In the present case there is no reason to believe that there is any collusion; but is there not, from the whole case, the strongest ground for believing that they have been induced by fear? There is, I admit, no positive evidence under what circumstances they were made. But why was the admission recalled in the same conversation? Why did the defendant say to Captain Tuttle that she would die before she admitted it again? The whole character of the petitioner, and his conduct

towards his wife, leaves a strong impression on my mind that she has stated the truth in her answer, that she made the admission from fear of her husband. A great many witnesses have been examined, the neighbors of these parties. They one and all speak of Mrs. Miller as a woman of good and virtuous reputation—as a subdued woman—and several of them speak of her as being in fear of her husband. He is shown to have treated her often rudely, even to blows, and to have left her in tears. His temper is represented as hasty, easily put out, and jealous. His own petition declares that he was jealous of her from the first. Instead of asserting her rights, and taking her own part, she always yielded, and sunk down under his bad treatment. It is not necessary that it should be positively proved that she made the confession under fear: it may be inferred from the general conduct of her husband toward her. Great allowance must be made for a woman situated as Mrs. Miller was. She ought never, it is true, to have been forced into so indiscreet a course. She was evidently broken down and disheartened. She did, however, correct the error on the spot, but it was too late. Her husband seized upon the admission, and has never yielded his grasp.

But the parties agreed to separate, and Captain Tuttle, with his wife, who was the sister of Mrs. Miller, were sent for. On that occasion Mrs. Miller was willing to give up everything. She then signed articles of separation, and left her home, with no other than the nominal provision of one dollar. Is this the course of conduct to be looked for in a hardened woman? Had this been her character, she would have insisted on the uttermost farthing. She gave up everything. She declared her innocence, and said she signed the articles freely. She acted, in my judgment, like a broken-hearted woman. It is stated by one of the witnesses, that afterwards, at the Baskenridge church, he asked Captain Tuttle whether he believed these stories about Mrs. Miller; and he answered that he did not—that he believed she was an innocent woman.

Whether, therefore, I look at the positive proof by which this case is attempted to be sustained, at the admissions made by the defendant, or at the general circumstances connected with it, I see no ground for divorcing these parties on the present application. After carefully reading and examining the whole evidence, I feel bound to declare my decided impressions to be, that the defendant, Mrs. Miller, is the injured party. The evidence

does not satisfy me that she has committed adultery. The petition must be dismissed, with costs.

Petition dismissed.

This decree was affirmed on appeal at the May term, 1839, with costs.

CONFESSION BY WIFE TO FACT OF ADULTEROUS INTERCOURSE will not enable the court to grant a divorce on a charge of adultery, sustained by such confession alone: *Derby v. Derby*, 6 C. E. Green, 47, citing the principal case in support of this proposition, and also to the additional point, that such confession may be disregarded, when the general conduct of the husband towards his wife gives occasion for the inference that the confession was made through fear.

Upon the question of the admissibility of the confessions or admissions of the parties to an action for divorce, see the note to *Richardson v. Richardson*, 30 Am. Dec. 544.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
NEW YORK.

FROST AND DICKINSON v. BRISBIN.

[19 WENDELL, 11.]

RESIDENT—ONE COMING TO THIS STATE FOR A SPECIAL and temporary purpose, without any intention of settling, is not a resident here within the meaning of the act for the relief of insolvent debtors.

To CONSTITUTE A RESIDENCE there must be a settled, fixed abode, an intention to remain permanently, at least for a time, for business or other purposes.

DOMICILE MAY BE IN ONE STATE, and residence in another.

NON-RESIDENT—ONE WHO LEAVES THIS STATE and goes to another and establishes a business there, intending to reside there if the business does not prove unsuccessful, and who there gives the business his personal supervision and control, becomes a non-resident of this state, although his wife and child remain here; and such person may be arrested here as a non-resident, although he had, when arrested, been in this state, on a visit, for more than one month.

OBJECT OF THE STATUTE OF 1831 ABOLISHING IMPRISONMENT for debt was to exempt from imprisonment persons who permanently, for the time being reside here, and whose property and person are within the reach of the process of our courts.

MOTION to be discharged from arrest and for the release of bail. Prior to May, 1836, defendant was a resident of New York. In that month he purchased a large stock of goods in New York, and went with them to Milwaukee, Wisconsin. When making the purchases he informed the merchants of whom he bought that he intended going to Milwaukee to start in business and to reside. His wife and child remained in New York. He remained in Milwaukee after May, 1836, personally attending to his business there, until March, 1837, when he returned to

New York on a visit and remained until his arrest in this action in May of the same year. He was held to bail and then returned to and has since remained in Milwaukee, conducting his business. In December, 1836, he was, by the legislature of Wisconsin, appointed a director of a bank and commissioner to receive subscriptions therefor. He filed in this action the affidavits of several persons, to the effect that in going to Wisconsin, he did not intend to remain unless his business proved successful; that it had not so proved; that he intended, as he had often stated, to break up and close out his business and return to his former residence in New York, his purpose regarding his future course being, however, uncertain.

C. Ellis and S. Stevens, for the motion.

M. T. Reynolds, *contra*.

By Court, NELSON, C. J. The act of 1831, abolishing imprisonment for debt in this state, provides that no person shall be arrested on civil process in suits brought upon contracts express or implied, except in cases where the defendant "shall not have been a resident of this state for at least one month previous to the commencement of a suit against him." The question here is, whether the defendant, at the time of the arrest in May last, was a non-resident, or in other words, whether he was a resident of the state for the above space of time, within the meaning of the act. If the decision of the question turned upon the formed intention and purpose of the mind of the defendant, without reference to the fact of actual residence, the preponderance of the proof is in favor of the motion; but if we are bound to regard this fact independently of any mental reservations and intents, then I think the opposite conclusion is best supported.

The affidavits show that the place of business of the defendant is out of the state (at Milwaukee), and as conceded, the management of his business is under his personal supervision and control; that since May, 1836, to the present time, he has been and now is engaged in conducting business at that place; and that he commenced business there as a merchant, with intent to make it his permanent residence. The mental condition about success, which is sought to be attached, if sufficient, might always be urged to defeat a residence when necessary, as few persons probably intend to remain permanently at a place in unsuccessful business; neither do they engage in it expecting it to be so. It may, therefore, I think, be safely assumed the defendant commenced business at Milwaukee, as he honestly

declared to his creditors, with the intent to make it his permanent residence, and that at least he was a resident there till he found by trial his business did not succeed. Did his change of mind while continuing in business there, even with a view to close it up, and before closed up and removal, operate as a change of his residence? The answer to this question will depend upon the meaning or legal import of the term residence, in the connection in which it is used in the statute.

In *Matter of Fitzgerald*, 2 Cai. 317, it was decided that a person coming into this state and remaining for a special and temporary purpose, without any intent of settling here, was not a resident within the meaning of the act for relief against absconding debtors. In *Matter of Thompson*, 1 Wend. 43, the court held under the same act, but in respect to an absent debtor, that residing abroad, engaged in business for a time, whether permanently or temporarily, was a "residing out of the state" within the meaning of the statute; that the actual residence of the debtor was contemplated, which might be distinct from the place of his domicile. In *Matter of Wrigley*, 4 Id. 602; 8 Id. 134, it was held that a person remaining temporarily for a month in the city of New York and Brooklyn, intending to commence business in Canada, was not an inhabitant or resident, within the meaning of the insolvent act of 1813. In *Roosevelt v. Kellog*, 20 Johns. 210, 211, a resident of a place is said to be synonymous with an inhabitant, one that resides in a place. It may, I think, be doubted, if this position is strictly accurate, as the latter term implies a more fixed and permanent abode than the former; and frequently imports many privileges and duties which a mere resident could not claim or be subject to. Approved lexicographers give a more fixed and definite character to the place of abode of the one than the other. Be this, however, as it may, the cases cited above establish that the transient visit of a person for a time at a place, does not make him a resident while there; that something more is necessary to entitle him to that character. There must be a settled, fixed abode, an intention to remain permanently at least for a time, for business or other purposes, to constitute a residence within the legal meaning of that term. The cases above referred to for the illustration of its meaning are quite pertinent to the present question, as the statutes in which it was used, and which it was the object of the cases to expound, related to a kindred subject, namely, the regulation of the rights and remedies of creditor and debtor. One of these cases expressly, and all of them virtually, decide that

actual residence, without regard to the domicile of the defendant, was within the contemplation of the statutes. Whether, therefore, the defendant had so established himself at Milwaukee as to work a change of his domicile or not, is immaterial ; for if we concede he has not, he may still be a resident there. The domicile of a citizen may be in one state or territory and his actual residence in another.

I have already said that we are bound to assume upon the facts before us that the defendant commenced an actual and permanent residence at Milwaukee in the spring of 1836. But we must also concede, I think, that since that time he has resolved to break up his business there as soon as it can be conveniently closed, and return to his former place of residence. Has this change of intention worked a change of residence? for this is the most that can be pretended. If our exposition of the meaning of the term in the statute is correct, it clearly did not. His actual residence is still at Milwaukee. He is still carrying on his business there, and may continue it for such time as he pleases. Change of mind may lead to change of residence, but can not with any propriety be deemed such of itself. It was urged on the argument, that if it were admitted that the defendant was a resident and had his domicile at Milwaukee, still, as he had been in this state more than a month previous to the arrest, he was within the exception in the statute; and that the mere being in the state as a transient person for that time was sufficient. The cases we have already referred to, sufficiently repudiate this construction.

But it is said without such interpretation the statute is in violation of the constitution of the United States, art. 4, sec. 2, which ordains that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." This is obviously an erroneous view of the constitution. Our own citizens must be residents for the month, to be entitled to the exemption under the statute. The privilege from the arrest does not depend upon citizenship or domicile, any further than they may include residence, but upon residence, such as we have endeavored to explain. The idea of the statute was to limit the privilege to debtors living permanently in the state for the time being, which it was presumed would generally bring their property within the reach of execution; or enable the creditor to apply any other coercive measure in the collection of his debt, which the laws have provided. All our construction of the statute exacts, in respect to citizens of other states or territories is, that they shall put themselves on a foot-

ing with our own citizens, and then they are entitled to the like immunities. Surely this clause of the constitution enjoins nothing farther. The argument goes the unreasonable length of claiming for citizens of other states privileges surpassing our own.

Motion denied, with costs.

THE TERMS INHERITANCY, RESIDENCE, CITIZENSHIP are not susceptible of an exact, all-reaching definition for the reason that their meaning varies as does the subject-matter with reference to which they are used. Where, however, an attachment law gives a *quasi* proceeding *in rem* against a non-resident, the residence which is therein meant seems to have received a certain and unequivocal construction; it will intend an actual permanent residence, which was originally established with the intention of being continued such length of time as would enable the convenient institution, during its term of proceedings against the party, in the courts of the jurisdiction in which he has settled. The term is by no means synonymous with "domicile." For within the meaning of these statutes a person domiciled abroad may be a resident, while a person domiciled in the state may be a non-resident. A review of some of the cases will make the matter plainer.

In *Long v. Ryan*, 30 Gratt. 718, the case presented was that of a person domiciled in Washington, who removed in December, 1868, to Virginia with the intention of remaining there until September 1, 1869, that being the time during which he was to be employed in the completion of a contract into which he had entered, and who intended to leave the state immediately after the completion of the contract. Upon this state of facts the court considered him to be a resident in the sense that he was not liable to be subjected to the process of attachment given by statute against non-residents. Of course in the case stated there could have been no pretense that Ryan was domiciled in Virginia. To the same effect see *Brown v. Ashbough*, 40 How. 260; *Mandell v. Peet*, 18 Ark. 236.

It is equally true that a person might be domiciled in the state and yet be a non-resident. Thus where a defendant against whom the process of foreign attachment had been instituted offered to prove in support of his plea that he was not a non-resident, that his entire absence from the state, which had continued for three years and a half, had been necessitated by his attendance on a law-suit which required his presence in New Orleans, his offer of proof was rejected for the reason that it showed upon its face that he was a non-resident: *Haggart v. Morgan*, 1 N. Y. 428. And where a mother left the state of Mississippi for that of Alabama, in order that she might the better attend to the education of her children, though her intention was to return to Mississippi after she had accomplished this object, she was considered liable to the process of foreign attachment, as being a non-resident: *Alston v. Newcomer*, 42 Miss. 186; *Morgan v. Nunes*, 54 Id. 311; *Wheeler v. Cobb*, 75 N. C. 21; *Stout v. Leonard*, 37 N. J. L. 495; *Risewick v. Davis*, 19 Md. 82; *Nailor v. French*, 4 Yeates, 241.

But a mere temporary absence of a few weeks will not constitute the party a non-resident, if at the time of departure from the state there was an intention of returning at the expiration of that period: *Reed's appeal*, 71 Pa. St. 382; *Pfouts v. Comford*, 36 Id. 420.

E converso, a mere presence in the state unaccompanied with any intention to remain there for any length of time, will not constitute a residence:

Perrine v. Evans, 35 N. J. L. 221; *Jackson v. Perry*, 13 Mon. 232; *Matter of Wrigley*, 8 Wend. 134; *Matter of Fitzgerald*, 2 Cal. 318; *Burrows v. Miller*, 4 How. Pr. 349.

Nor will it constitute one a resident of the state, that he carries on his business there and is for a large portion of his time present in it on account of the necessary superintendence that such business demands if his regular place of abode is in another state: *Perrine v. Evans*, *supra*. And if a person is accustomed to pass the winter in one place, the summer in another, he can be treated as a non-resident of his summer abode during the winter season and *vice versa*: *Stout v. Leonard*, *supra*. This too though his summer abode is the place of his domicile.

A RESIDENCE IS LOST, OF COURSE, BY THE DEPARTURE from the state with an intention of not returning or of taking up an abode elsewhere. But a question which has presented itself several times, and has been differently decided, is whether the character of resident can be lost before the intention of leaving has been fully carried out; whether, in a word, a former resident can become a non-resident before he has crossed the boundary line: In *Spalding v. Simms*, 4 Metc. (Ky.) 285, Spalding had attached goods belonging to Simms, on the twenty-first of April. Whether sufficient cause to support the attachment existed or not, depended upon a statute which gave the remedy against debtors "who had been absent therefrom (the state) four months." It appeared that Simms had left his home, some sixty miles from Louisville, on the eighteenth of December preceding, expecting to leave Louisville by steamer on the twentieth of the same month, but that unexpected and unavoidable delays had detained him at Louisville until the twenty-fourth of December, when he embarked. The opinion of the court upon this state of facts was that "where the debtor leaves his home with the intention of going out of the state, and does consummate this purpose, and is absent from his home pursuant to such intention for the period of four months, we think this should be regarded as an absence from the state, within the meaning of the code and the intention of the legislature, notwithstanding some unlooked-for casualty may have delayed him a few days from passing beyond the territorial boundary of the state." It was also decided in *Clarke v. Ward*, 12 Gratt. 448, that a departure from one's usual place of abode with the intention of setting off to a distant state, to there take up a residence, would at once constitute the person a non-resident: See also, *Moore v. Holt*, 10 Id. 289. But in *Ballinger v. Lantier*, 15 Kans. 606; *Bonnell v. Dunn*, 4 Dutch. 153, the point was decided the other way.

But the residence required by law to entitle one to a vote means a fixed domicile, and will not be lost by an occasional absence, *animo revertendi*: *Cadwallader v. Moore*, 3 Harr. 138. Thus though the law requires that to entitle one to a vote there should have been a residence in the county in which the vote is claimed for at least one year immediately preceding the election, the right to vote of a person, domiciled in the county for the preceding year, will not be defeated by his having passed the winter season in another state: *Id.*; *Crawford v. Wilson*, 4 Barb. 505; *Blanchard v. Stearns*, 5 Metc. 304. For the purposes of taxation, residence and domicile will be considered convertible terms. Thus a citizen of Georgia passing the summer in New Jersey for the sake of his health will not be taxable in the latter state upon his personal property of an intangible nature: *State v. Ross*, 3 Zab. 528; *Moore v. Wilkins*, 10 N. H. 456. The context of the statute might, however, require a different construction; thus, where the legislature enacts that where a person has two or more residences, he shall be taxable in that place of resi-

dence in which he carries on his principal business, the legislative recognition that a person may have two residences will bind the court and prevent it from treating residence as of the same meaning as domicile: *Bartlett v. New York*, 5 Sandf. 46; *Douglass v. New York*, 2 Duer, 120. So with reference to the settlement of paupers, the word residence seems to be synonymous with domicile: *Abington v. North Bridgewater*, 23 Pick. 170. Where a statute provides that no person shall be proceeded against by summons out of the county in which he resides, the residence meant will be the place of domicile: *Church v. Crossman*, 49 Iowa, 447.

In *Isham v. Gibbons*, 1 Bradf. 84, the words inhabitancy and residence were also declared to be synonymous with domicile where used in reference to testamentary cases. The court thus summed up the doctrine: "In statutes designed to give creditors prompt remedies against absent debtors, it is just to consider the word resident as meaning an actual resident merely. In provisions, however, relating to testamentary cases which depend upon the law of domicile, it is equally rational to construe the term in consonance and harmony with the established rule of law, rather than to indulge the supposition that the legislature intended by a provision evidently designed to facilitate the proof of foreign wills, to override the law of domicile." It seems to follow that in almost all cases outside of attachment laws, the words residence, inhabitancy, and citizenship are convertible with the term "domicile." See also note *Grier v. O'Daniel*, 1 Am. Lead. Cas. 743.

Most of the cases cited above upon the subject of attachment have cited the principal case with approval.

IN THE MATTER OF THE ELECTION OF DIRECTORS OF THE LONG ISLAND RAILROAD COMPANY.

[19 WENDELL, 37.]

POWER TO REGULATE ELECTIONS means the power to establish fixed rules and methods of proceeding for the government of elections; fixing time and place of election is within this power.

BY-LAW OF CORPORATION DECLARING THAT STOCK SHALL BE FORFEITED for default in the payment of calls, can not be legally enacted under a statute giving the corporation power "to make by-laws not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and for the transfer of stock."

BY-LAW OF A CORPORATION IS VOID, if contrary to law, as where it imposes a forfeiture of goods, or is in restraint of trade, or is enforceable by extraordinary penalties.

NOTICE OF AN ELECTION OF DIRECTORS must be for the time and in the manner provided by statute, when the by-laws, though fixing the time and place for the election, fail to state what length of time or in what mode the notice shall be given.

TRANSFER BOOK OF THE CORPORATION IS CONCLUSIVE upon the question of who are entitled to vote at the election.

ELECTION OF DIRECTORS MUST BE SET ASIDE when votes sufficient to change the result have been erroneously rejected. The court can not declare elected those who would have been elected had the votes rejected been counted for them.

MOTION to set aside an election of directors.

W. P. Hawes and S. A. Foot, for the motion.

Murray, Hoffman, and D. B. Ogden, against it.

By Court, NELSON, C. J. The first question presented on this application is, whether the late election of directors is not void by reason of the non-compliance with the sixth section of the act concerning corporations: 1 R. S. 603, sec. 6. It provides that "no by-law of the directors and managers of any incorporated company, regulating the election of directors or officers of such company, shall be valid unless the same shall have been published, for at least two weeks in some newspaper in the county where such election shall be held, at least thirty days before such election." The seventeenth section of the charter declares, that "all future elections of such directors, shall be conducted in the manner prescribed in the by-laws of the corporation." The first section of those laws provides, that the annual meeting of the directors shall be held in the city of New York on Saturday, next preceding the first Monday of June, in each year, and "that an election for directors shall be held at the last named day;" and by section 6, it is made the duty of the secretary of the company to give notice of the same. The earliest publication of notice, in this case, was on the sixteenth of May, for the meeting of the stockholders, on the fifth of June, a notice of twenty days. This might be considered reasonable, and sufficient to justify the election, were it not for the statute: if that has directly or virtually fixed the time, a compliance is essential to render it valid: *The King v. Theodorick*, 8 East, 544; Will. on Corp. 49; Ang. & Ames, 278; and can not be dispensed with by the unanimous consent of the corporators, as it would seem: *Supra*. It is true, that the sixth section of the revised statutes above referred to, does not make it indispensable, that the election of the directors should be regulated by means of a by-law, but rather implies the contrary; and when no such law exists, the statute publication is of course dispensed with. The notice of the time and place of the election, together with the requisite qualifications of voters, would then depend upon the provisions of the charter; or if that contained nothing respecting them, then, upon the common law, or usage of the company. But in this case, the charter seems to contemplate the regulation of the election by means of by-laws, as the seventeenth section declares that all future elections of the directors shall be conducted in the manner prescribed in these laws.

The only doubt that can exist, I think, is whether the appointment of the time, and place, when, and where the elections shall be held, should be deemed in part regulating it within the intent of the sixth section. The term regulating, according to the best lexicographers, and which manifestly accords with the force of the word in the connection here found, means the establishment of fixed rules and methods of proceeding for the government of the election. It is comprehensive enough to embrace all the powers possessed by the directors over this subject, and should, probably, be construed coextensive with them. Fixing time and place is undoubtedly among them. Indeed, any regulation of the election would be imperfect, in which these did not enter into the arrangement. There is one provision of the charter, which leads to the conclusion that the notice prescribed by the sixth section, was in the mind of the legislature, in the enactment. It is the eighteenth section which provides that "no stockholder shall be allowed to vote, etc., for any stock that shall have been assigned to him, at any time within thirty days prior to the time at which such election shall be held."

With a notice of two weeks previous to the thirty days, no embarrassment need arise out of the sixth section; but without it, the holders of a large portion of the stock might be disqualified, on account of transfers within the time limited: they might be unadvised of the election in season to avoid the difficulty. In this case, some one thousand seven hundred shares of the stock were not represented, though the holders appear to have been qualified; and upwards of eleven thousand were transferred within the thirty days. The statute providing for long notice to the stockholders, should be liberally expounded; it enables them to qualify for the election, tends to promote a full assemblage, and thereby guards against contrivance, and the ill effects that may result from partial representation. Upon the foregoing view, I am inclined to think the by-law, fixing the time and place of the election, falls fairly and reasonably within the terms of the sixth section, and that the notice is to be considered as virtually regulated by statute, and of course can not be modified, or dispensed with.

If, however, there should be any doubt upon the first ground, there is another taken against the regularity of this election, which is unanswerable. Edwin Lord, on the fifth of May, 1837, was the owner of two thousand seven hundred shares of the stock of the company, by an assignment from the individuals, in

whose names they stood upon the books; he applied at the proper place to have the transfer entered upon the books, and asked a new certificate upon the surrender of the old ones, agreeably to the twelfth and thirteenth by-laws of the corporation; proposing, at the same time, to pay the installments in arrears: all of which was refused for the reason, as alleged, that the stock had already been declared forfeited for default, in payment of the calls. For the like reason his votes were refused at the election, upon one thousand two hundred shares of the same stock of which he held regular proxies. Twenty-two dollars and fifty cents had already been paid on each of the two thousand seven hundred shares, amounting, in the whole, to sixty thousand seven hundred and fifty dollars. If Lord had been permitted to vote upon his stock, or even upon the proxies, the result would have been changed in respect to all the candidates upon the successful ticket, except those named on both. The question then arises, whether the directors possess authority under the charter, to declare a forfeiture of stock to the company for the non-payment by the holder of the installments called in. If they do not, the acts of the board in this respect were nugatory, and Lord is still the holder of the two thousand seven hundred shares, and should have been permitted to vote; the transfer of these shares to him, which appears to have been regular, should have been entered upon the books when application was made for that purpose, agreeably to the by-laws; and, at all events, his votes should have been received upon the proxies. The power of forfeiture has not been expressly conferred by the terms of the charter, but it is claimed as implied or incidental, being indispensable to carry into effect the express objects of the incorporation.

The argument is, that no suit at law or in equity will lie against a subscriber after he has parted with his stock, nor against the assignee, unless there has been an express promise to enforce the payment of the installments, and that no other remedy than forfeiture exists to enable the directors to realize the funds belonging to the institution: 6 Mass. 40;¹ 11 Id. 117;² Ang. & Ames on Corp., c. 14, p. 292, and cases there cited. We are not aware that it has ever been decided in this state that an action can not be maintained against the assignee without the aid of an express promise; and the contrary position does not seem to be without authority: 6 Har. & J. 128;³ 2 S. C. Cond.

1. *Andover etc. Turnpike Co. v. Gould*; 8 C., 4 Am. Dec. 80.

2. *Phillips Limerick Academy v. Davis*; 8 C., 6 Am. Dec. 163.

3. *Bend v. Susquehanna Bridge etc. Co.*; 8 C., 14 Am. Dec. 261.

215;¹ 7 T. R. 36.² There is certainly great force in the observation of Lord Kenyon, in *Huddersfield Canal Co. v. Buckley*, that after assignment the assignees hold the shares on the same conditions, and are subject to the same rules and orders as the original subscribers, and are to all intents and purposes substituted in the place of the original subscribers. But even were we to assume that the decision of the court would eventually be in favor of the non-liability of the assignee, it by no means follows that the company may, for that reason, resort to an extraordinary remedy, unknown to the common law in respect to him. This argument of necessity, however strong and weighty it may be, can hardly be admitted as sufficient ground to induce the court to permit a corporation to take redress into its own hands, and that, too, after a judicial determination that none existed in the ordinary administration of the law. The more reasonable and legal inference would seem to be, that the charter was defective; that the omission of a power in the directors to declare a forfeiture of stock left the corporate body impotent, and that an amendment became necessary to enable them to carry out the purposes of its institution.

The corporation possess the power to make by-laws not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and for the transfer of stock: 2 R. S. 602, sec. 1, sub. 6. This is the broadest general power conferred upon it; but it is not new, and would have existed as incidental. When taken as incidental it must be exercised in conformity to the general law of the land, that being the rule to regulate the proceedings of artificial bodies, as well as the conduct of natural persons, independently of express provisions of the charters of those companies to the contrary. This general law has ascertained the rights of person and of property of the citizen, and established modes of proceeding in case of a violation of them; and corporate bodies must conform to them, in seeking redress, the same as individuals. The former can no more take the remedy into their own hands than can the latter. So strict has this salutary principle of subjection been held in England; that even a by-law in pursuance of an express power in a charter granted by the king, is void, if contrary to the common law or act of parliament: 1 Kyd on Corp. 109; Will. on Corp. 95; Ang. & Ames, 186; 8 Co. 125 a, 127 b;³ 2 Inst. 47; 1 T. R. 118.⁴ Thus a by-law imposing a

1. *Columbia v. Harrison*.

2. *Huddersfield Canal Co. v. Buckley*.

3. *City of London's case*.

4. *Kirk v. Newell*.

forfeiture of goods is void, though the letters patent authorized it; and a power granted to a corporation of dyers to search, and if they found cloth dyed with logwood, to seize it as forfeited, was adjudged void as contrary to Magna Charta. On the same principle, by-laws in restraint of trade are adjudged void: 11 Co. 53;¹ 1 Burr. 12;² 4 Id. 1951;³ 7 Dow. & Ry. 601;⁴ 1 Bac. Abr. 547; Ang. & Ames, 184; Will. 142. So a by-law that may be lawful can not be enforced by an extraordinary penalty, such as imprisonment or forfeiture of goods, or by distress and sale of goods, for, by the general law of the kingdom, no man is to be imprisoned, or dispossessed of his goods and chattels *nisi per legale iudicium parium suorum, vel per legem terræ*; and if such penalties were allowed, corporations would be enabled to set up private particular laws in contradiction to the laws of the land, which is against the nature and essence of a by-law: *Clark's case*, 5 Co. 64; 3 Salk. 76; Will. 98; 1 Bac. Abr. 551.

Even an act of parliament does not by implication invest the corporation with any extraordinary authority; and if it is intended to be given, it must be by express words to that effect. In *Kirk v. Nowill*, 1 T. R. 118, which was an action of trespass for seizing and taking a quantity of forks, the defendant justified under an act of parliament incorporating the inhabitants of the liberty of H. into a company of cutlers, and under a by-law of the company. The act authorized the adoption of such by-laws as appertained to good regulation and workmanship in the manufacturing of cutlery wares, with power to impose reasonable pains, penalties, and punishment, by fine or amercement, in case of violation, and which was to be levied to the use of the corporation for the benefit of the poor. The company ordained that the searchers (officers recognized in the act) should search for unworkmanlike wares, and seize, carry away, and destroy the same. The property was seized under and by virtue of this by-law. Lord Mansfield observed that a corporation in the definition of it, is a creature of the crown, created by letters patent; that such a corporation, with the power of making by-laws, can not make any such law to incur a forfeiture; that those corporations which are created by act of parliament have no other additional powers incident to them, than those have which are created by charters, unless they be expressly given; and that no such extraordinary power of making by-laws to incur a forfeiture, appearing upon the plea to have been conferred, it was impossible for the court to say that the by-law in that case could be supported

1. *Tailors of Ipswich's case*.

2. *Harrison v. Godman*.

3. *Woolley v. Idle*.

4. *Chamberlain of London v. Compton*.

by the act. Buller, J., remarked, that taking it generally as a by-law creating a forfeiture, the act of parliament not having given the corporation the power to make such a by-law, it was bad on that ground. In all the cases where this power to declare a forfeiture of stock as expressly given by the charter, has been incidentally noticed by the courts, it has been regarded as a new and cumulative remedy to the one existing at common law: 1 Cai. Cas. in Err. 85;¹ 1 Cai. 389, Radcliff, J.;² 9 Johns. 218;³ 6 Mass. 40;⁴ 2 Bibb, 576.⁵ This has also been the understanding of the legislature; for, on examination, it will be found that the power has been usually conferred by an express provision in the charters, from the earliest period down to the present time. Upon the whole I am entirely satisfied the directors possessed no authority under the charter to declare a forfeiture of the stock; that their acts in this respect were wholly void, and left the rights of the stockholders in full force; and that the sales which were made, and attempted transfers of the supposed forfeited shares, passed no title to or interest in them to the purchasers.

It appears from the affidavit of the inspectors, that they have no recollection of the offer of Lord to vote upon the proxies, though the fact is distinctly stated by him; and further, that he procured them for the purpose. The fact is not very material, because it is obvious that the rejection of his votes was put upon the ground that the stock he held and proposed to vote upon, either in his own right or by proxy, had been declared forfeited. We can not but see, if he had held proxies for the whole amount they would have been unavailable. From the broad terms of the statute, also, under which we act in this matter, 1 R. S. 603, sec. 5, we are bound, I think, to regard the refusal to enter the transfer of the stock upon the books according to the by-law of the company, by which Lord was wrongfully prevented from voting in his own right upon the whole two thousand seven hundred shares, illegal.

The votes upon the stock standing in the name of D. Jackson were properly received. The inspectors were not to inquire beyond the transfer book: 1 R. S. 603, sec. 6. Any private agreement or understanding, between the individual holding the legal title to the stock in due form and others, is a matter between themselves, with which the corporation have no concern: *Ex parte Wilcocks*, 7 Cow. 402 [17 Am. Dec. 525]. Besides, no such objec-

1. *Jenkins v. Union Turnpike.* 2. *Union Turnpike v. Jenkins.*

3. *Goshen etc. Turnpike v. Hurtin*; S. C., 6 Am. Dec. 273.

4. *Andover etc. Turnpike Co. v. Gould*; S. C., 4 Am. Dec. 80.

5. *Intons v. Frankfort Bridge Co.*; S. C., 5 Am. Dec. 637.

tion was taken before the inspectors. The ground there assumed was, that the installments were in arrear; an objection not insisted upon in the argument here. The objection that the inspectors refused to produce the books of the company, when called for to test the qualifications of the voters, does not appear to be maintained in point of fact. We can not avoid remarking, however, that this should never be a matter of dispute in respect to the regularity of an election. The books should be present for the convenience of those concerned; the statute is very particular and peremptory on the point: 1 R. S. 601, sec. 1; 603, sec. 6.

Were I not inclined to the opinion that the election was irregular on account of the defect of notice, the four directors whose names were upon both tickets might be permitted to hold, and the order for a new election be confined to the remaining nine. The rejected votes upon Lord's stock would, of course, not have varied the result as to them. If the whole proceeding, however, is to be deemed irregular, it seems necessarily to follow, that it must be entirely vacated. No inconvenience can arise from this course, because, if it is the wish of both parties that those four individuals should continue in the direction, and which is understood from the observations of counsel, it will be in the power of the stockholders to re-elect them.

It seemed to be supposed by the counsel for the motion, that it would be competent for the court not only to set aside the directors irregularly elected, but also to affirm the election of the opposite ticket. This we can not do, unless we assume the power of pronouncing duly elected a ticket which confessedly received a minority of the votes. We can not give effect to the votes of Lord, the same as if they had been received; as injustice has been done him, we can repair it by affording him an opportunity to vote.

As the counsel have referred to me to fix the time when the new election shall take place, I shall direct that the statute publication and notice be given, which is a notice of two weeks, thirty days before the election: 1 R. S. 603, sec. 6; the election to be held the same as if it was the regular annual one; the test of qualification to be with respect to the time when it is held, and not as of the fifth of June last. This will enable all the existing stockholders to prepare and control the direction, if they choose; thus placing the power where it was intended by the charter to be, in the hands of a majority of the stockholders.

THE ILLEGAL REJECTION OF SUFFICIENT VOTES to have changed the result of a corporate election will be cause to set the election aside; but the court can not upon the assertion of those whose votes were rejected that they would have cast their votes in favor of certain persons, proceed to declare such persons elected: *Hart v. Harvey*, 19 How. Pr. 252; S. C., 32 Barb. 62; 10 Abb. 327; *People v. Phillips*, 1 Denio, 396, relying upon the principal case.

A BY-LAW OF A CORPORATION CAN NOT IMPOSE THE FORFEITURE of stock, of goods, or of other corporate interest as a penalty for its breach: *Master Stevedores Association v. Walsh*, 2 Daly, 14; *Cosenback v. Salt Springs Nat. Bank*, 53 Barb. 506; and therefore where a power to enforce the payment of installments due the company upon stock, by declaring a forfeiture of the stock, is conferred upon the corporation, the power will be considered cumulative, and the payment may, notwithstanding the grant, be likewise enforced by action: *Troy Turnpike & R. R. Co. v. McChesney*, 21 Wend. 299. The denial of the power to declare a forfeiture will not operate to invalidate what is evidently a pecuniary penalty, imposed by a by-law, though in the description the word "forfeiture" is erroneously used: *Master Stevedores Assn. v. Walsh*, *supra*. Nor is the condition in a policy issued by a mutual insurance company that it shall be invalidated in case default be made in the payment of assessments on the premium note for the period of thirty days, a void condition, as this condition derives its force from the mutual consent of the parties and is not *in invitum*: *Beadle v. Chenango etc. Ins. Co.*, 3 Hill, 162; all citing the principal case.

COURT MAY LOOK BEYOND THE ENTRIES on the transfer book, to determine upon a right to vote stock, though such entries would be conclusive upon the inspectors: *Strong v. Smith*, 15 Hun, 225, citing the principal case.

INSPECTORS MAY REGULATE THE TIME OF KEEPING OPEN A CORPORATE ELECTION, so that it shall afford a reasonable opportunity to stockholders present to cast their votes, though the election should thereby be prolonged beyond the time mentioned in the notice: *People v. Albany & Sus. R. R. Co.*, 55 Barb. 361, citing the principal case.

The principal case has been also cited in *Matter of the M. & H. R. R. Co.*, 19 Wend. 140.

CORPORATION MAY PROVIDE FOR THE REGULATION OF ELECTIONS by by-laws that are reasonable and not repugnant to the charter, nor to any laws of the state: *Taylor v. Griswold*, 27 Am. Dec. 33. Thus the by-law may vest the appointment of inspectors of election in the president, and may prohibit the use at the election of tickets on which other things than names appear: *Commonwealth v. Woelper*, 8 Id. 628, and note 640. But no by-law can provide for the voting shares of stock by proxy: *Taylor v. Griswold*, *supra*; but see *contra*, *State v. Tudor*, 5 Id. 162, and note to the former case, Id. 60.

SALISBURY V. STAINER.

[19 WENDELL, 159.]

THERE IS NO IMPLIED WARRANTY IN A SALE OF BALED HEMP, that the interior of the bales corresponds with the exterior. In the absence of fraud, the vendee can not recover damages from the vendor, on account of a difference between the interior and the exterior of the bales.

SALE BY SAMPLE DOES NOT TAKE PLACE when the purchaser of several bales of hemp cuts open and examines some of them and has ample opportunity to do so with the rest. In such a case there is no implied warranty that the bales not examined correspond with those examined.

CASE for deceit, in the sale of one hundred and eighty-four bales of Italian hemp. There was also a count upon a warranty. The plaintiff before purchasing was sent by defendant to the place where the hemp was stored, and directed by defendant to examine it well for himself. He cut open one bale, and might have cut into the others. When the plaintiff came to work the hemp it was found that the interior of the bales did not correspond with the exterior; was of very poor quality and contained considerable tow. The defendants had sent plaintiff a letter accompanying the invoice, in which were clauses as follows: "There is no more first quality hemp now remaining, but we should be glad to sell our third quality at about one hundred and seventy-five dollars, if you have any use for it. We have only eight tons of it on hand. Our second quality we hold at two hundred and five dollars for retail. Advices received from Trieste this morning, by the English packet, quote first quality Ferrara hemp, same as sold to you." It was also shown that the defendant in speaking of the hemp to persons other than plaintiff, spoke of it as first quality. That there could be no recovery on the ground of fraud was conceded by plaintiff. The jury was charged that the plaintiff could recover only on the ground of express warranty or sale by sample; that it was for the jury to decide whether plaintiff's statements were express warranties or mere expressions of opinion; that as the bales could not be internally inspected there was an implied warranty that the interior corresponded with the exterior, and the defendants were liable if it did not so correspond. The jury found specially that the sale was by sample, and gave verdict for plaintiffs six thousand one hundred and ten dollars and forty-five cents. Defendants moved for a new trial.

D. Graham, for the motion.

H. P. Hunt, contra.

By Court, BRONSON, J. This was not a sale by sample. Salisbury was told to examine, and did examine the hemp for himself. He inspected the bales, cut open one of them, and was at liberty to open others, had he chosen to do so. If he was not satisfied of the quality and condition of the goods, he should either have proceeded to a further examination, or provided against a possible loss by requiring a warranty. Where the purchaser has an opportunity to inspect the goods, no principle is better settled than that the seller, in the absence of fraud, is not answerable for latent defects. The rule in such cases is *caveat*

emplor. The judge erred in charging the jury that there was an implied warranty that the inside should correspond with the outside of the bales. It is unnecessary to examine the other exceptions taken on the trial.

New trial granted.

IMPLICATION OF WARRANTY UPON SALE OF GOODS BY SAMPLE that the bulk of the goods equals the sample, is confined to cases where the purchaser has no opportunity of examining the goods: *Hargous v. Stone*, 5 N. Y. 85; *Muller v. Eno*, 3 Duer, 425, citing the principal case, which is also cited to the same point in the dissenting opinion of Daly, J., in *Ely v. O'Leary*, 2 E. D. Sm. 361.

In *Beebe v. Robert*, 27 Am. Dec. 132, it was held that every sale by sample implied a warranty that the bulk of the goods equaled the sample, and the warranty bound the vendor, though the vendee had drawn fresh samples from the goods sold, in that case packed cotton, to assure himself that the bulk of the goods did correspond in quality with the sample. This case is in apparent conflict with those first cited, but is reconcilable with them by the fact that they recognize that this anomalous rule does prevail with respect to sales of cotton; anomalous at least in that it differs from the rule asserted by the New York courts in the case of all other sales of personal property: See also, to the same effect, *Boorman v. Jenkins*, 27 Id. 159 and note 166, in which the peculiar rule applicable to sales of cotton is recognized. In the note to *Bradford v. Manly*, 7 Id. 125, will be found an extended discussion of the subject of warranty implied by sale by sample.

JACKSON EX DEM. SUFFERN v. McCONNELL.

[19 WENDELL, 175.]

A PERFECT DESCRIPTION BY MONUMENTS, courses, and distances can not be limited by the words "containing two hundred acres and no more."

ACQUIESCENCE IN A BOUNDARY LINE is evidence of an agreement to abide by it, and, if continued sufficiently long to give title by prescription, is conclusive evidence.

DEED TO HUSBAND AND WIFE gives them an estate in fee, not as joint tenants, but as tenants of the entirety with the right of survivorship. Neither can alien without the other.

LEASE BY HUSBAND WHO IS A TENANT BY ENTIRETIES with his wife is valid to bring ejectment upon, though she did not join in such lease.

EJECTMENT. John Suffern, one of plaintiff's lessors, conveyed the premises in controversy to John S. Suffern (the other lessor of plaintiff) and Elizabeth, wife of said John S., "excepting and reserving two hundred acres off of the north side of the lot agreed by articles of agreement, dated June 21, 1814, to be conveyed by the grantor to John McConnell." In April, 1816, John Suffern conveyed to John McConnell, as required by a previous agreement. The tract conveyed was described as beginning at

a point specified; the courses and distances were then stated, and the conveyance concluded as follows: "containing two hundred acres, strict measure, and no more." The plaintiff claimed that defendant had taken possession of nine acres more than he was entitled to under this deed, and that the defendant was certainly in possession of more than two hundred acres, whereas the deed limited him to that number and no more. One Lawrence had surveyed a line as the south line of the two hundred acre tract, and to this the defendant claimed. The plaintiff, on the other hand, insisted upon a different boundary, known as Ludley's line. There was evidence tending to show the tacit acquiescence of John S. Suffern in the Lawrence line. The defendant insisted that the plaintiff could not recover on the demise of John Suffern, because of the conveyance by him to John S. Suffern and wife, nor on the demise of John S. Suffern, because of the non-joinder of his wife therein. Verdict for plaintiff which defendant moves to vacate.

J. A. Collier, for the defendant.

J. A. Spencer, for the plaintiff.

By Court, COWEN, J. I do not collect from the case that the question of excess in Lawrence's survey, of three or four acres over the two hundred intended to be conveyed to the defendant, was either submitted to the jury or passed upon by them. Certainly it could not be made available as in itself the ground of recovery. The words of exact restriction to two hundred acres and no more in the deed to the defendant could never be allowed to supersede or control a palpable description, so easily traceable as was the Lawrence survey, through its monuments, courses, and distances. The acquiescence of John S. Suffern for a length of time in the lines as run by Lawrence, was put to the jury as evidence of an agreement to abide by the survey made by Lawrence, especially of the south line, and such acquiescence for a great number of years as conclusive evidence of an agreement. This was as favorable for the defendant as would be warranted by the law, since the decision in the court for the correction of errors in *Adams v. Rockwell*, 16 Wend. 285. Mere silent acquiescence in an adverse possession, according to an erroneous line, is no bar till it shall have continued for the time demanded by the statute of limitations, unless the jury infer an agreement. The utmost here insisted on is acquiescence for sixteen years, and no express agreement to the fence as the true line, was shown.

The remaining question respects the demises laid in the declaration. John Suffern having by his deed transferred all his title to John S. Suffern and wife, the demise from the former became unavailable; and it was objected upon the trial, that the title residing in the two latter, the declaration should have stated a joint lease from them to the plaintiff. No doubt the plaintiff was bound to show such a title as enabled him to make a separate demise, as he has laid it in his declaration: *Doe ex dem. Marston v. Buller*, 3 Wend. 149. In examining the power of the lessor to demise, the first question is, whether he have a right of entry: *Adams Eject.*, Tillinghast's ed., 10; and it was not denied, in this instance, that such a right passed by the deed to John S. and wife. Could the former alone make a lease? All the books agree in the nature of the estate and seisin created by such a deed. Each of the grantees holds the land in fee—not in moieties, but in severalty (*per tout et non per my*, as it is technically expressed), with the right of survivorship; and so familiar was this feature, that I have met with but two of our states, among many whose courts have had it under consideration, which have refused to recognize it in the construction of their conveyances. These are Connecticut and Ohio, both of whose superior courts, however, admit that it is the well-settled rule of the common law: *Whittlesey v. Fuller*, 11 Conn. 337; *Sergeant v. Steinberger*, 3 Ham. 305.¹ Various legal consequences arising from such a peculiar estate have also been deduced by the cases. Neither the husband nor wife can, in their own right, alien any part without the concurrence of the other: *Jackson ex dem. Stevens v. Stevens*, 16 Johns. 115, *per* Spencer, J.; *Doe ex dem. De Peyster v. Howland*, 8 Cow. 283 [18 Am. Dec. 445], *per* Savage, C. J.; and see 16 Johns. 305.²

The husband's creditors can not take his interest in execution, *Rogers v. Grider*, 1 Dana, 242; *Roanes v. Archer*, 4 Leigh, 550, though it is certainly inferable, from *Barber v. Harris*, 15 Wend. 615, that his right *jure uxoris* might be thus appropriated: *Litchfield v. Cudworth*, 15 Pick. 23; *Stoebler v. Knerr*, 5 Watts, 181; *Brown v. Gale*, 5 N. H. 416; *Schermerhorn v. Miller*, 2 Cow. 439. That case holds that the husband alone may give a mortgage of such interest. Why then can he not enter or give a lease? It was suggested on the argument that here was something in the nature of a joint tenancy, in which case it is not settled, that one can demise without the other. If such were the consequence, none of the cases give countenance to the analogy,

1. 2 Ohio, 305; S. C., 15 Am. Dec. 553.

2. *Jackson v. Cary*.

unless it be those in Connecticut and Ohio; and these admit it to be peculiar with them. All the other cases deny that the seisin is in joint tenancy either in substance or form. That was the very question in several of the cases already cited; and to these may be added various others: *Thornton v. Thornton*, 3 Rand. 179; *Taul v. Campbell*, 7 Yerg. 319, 333 [27 Am. Dec. 508]; *Den ex dem. Hardenbergh v. Hardenbergh*, 5 Halst. 42, 45 [18 Am. Dec. 371]; *Shaw v. Hearsay*, 5 Mass. 521; *Ross v. Garrison*, 1 Dana, 35, 37, 38. The survivorship presents the greatest formal resemblance; and yet, instead of putting that on the notion of a joint tenancy, the authorities all refer it to the established effect of a conveyance to husband and wife, pretty much independent of any principles which govern other cases.

But if otherwise, I am not prepared to admit that one joint tenant is unable to demise his share, and so recover it in ejectment, without the concurrence of his co-tenant. A separate lease by him is considered a severance, at least *pro tanto*: *Doe ex dem. Marsack v. Read*, 12 East, 57, 61; *Doe ex dem. Lulham v. Fenn*, 3 Camp. 190. Nor does this conflict with the rule that joint tenants must bring a joint action, whether it be real or mixed, according to Co. Lit. 195, sec. 311, and the commentary. Those are cases where the action stands nominally in favor of the joint tenants, as plaintiffs on the record. The cases put are of a *præcipe quod reddat* or assize; and so the ejectment seems to have been in *Milne v. Cummings*, 4 Yeates, 577, in which Coke is followed. Such is also the case supposed by Sutherland, J., in *The People v. Webster*, 10 Wend. 554. Such also are the cases of *Schoonmaker's Ex'rs v. Elmendorf*, 10 Johns. 49; and *Gibson v. Todd*, 1 Rawle, 452, 455. We certainly collect from these and various other cases the general rule that joint tenants must join and be joined in all actions. Ejectment, however, is an exception. To many purposes the lessors of the plaintiffs are the real parties; but the fiction of a lease, when you come to examine the power of demise, seems always to have been treated as a reality. The cases cited from 12 East and 3 Campbell, go upon that. The lease working a severance, the lessee thus becomes a tenant in common with the other tenant, at least for so much of the estate as the declaration supposes to be demised. Being a tenant in common, he must in general sue alone: Co. Lit. 195. Nothing is joint between him and his co-tenant excepting possession; and though we hold that tenants in common may make a joint or several demise in ejectment, *Jackson ex dem. Vandenberg v. Bradt*, 2 Cai. 169, yet a great

majority of the cases are the other way: *Heatherly ex dem. Worthington v. Western*, 2 Wils. 232, and the cases there cited; *White v. Lessee of Pickering*, 12 Serg. & R. 435, and cases there cited; *Innis v. Cranford*, 4 Bibb, 241. Nor do I think the rule as to joinder would be at all different, if this case were to be considered as commenced and pending under our revised statutes, for you may insert the names of the real claimants in different counts in substance as formerly; "and all the provisions of law concerning lessors of a plaintiff shall apply:" 2 R. S. 231, sec. 5, 2d ed. The revised statutes, however, do not reach the case.

It is said that the wife should be a party in order to bind her; and that her husband being the sole party, she is not at all affected, and would not be even by a common recovery: 5 Halst. 45, 46, and authorities there cited. We have already seen how widely this general rule has been departed from in cases of ejectment. It is a mere possessory action; and a recovery never bound the right under the old form of proceeding. It worked little if any effect beyond changing the *onus probandi* in a cross action: *Adams' Eject.*, Tillinghast's ed., 315. The doctrine that you shall not divide one right into several, and in that way make several suits, did not apply.

I have said that in the case at bar the husband alone could not alien. The meaning is, he can not alien the entire estate. His case was put with that qualification in *Rogers v. Grider*; but *Barber v. Harris*, we have seen, holds that he may mortgage all the interest which he has in right of his wife; being seised *jure uxoris*, it follows that he may make a lease in his own name alone, or may join with his wife, at his option. So in effect, it was held by *Wilson v. Rich*, 1 Brownl. 134, 135. That was in the 44 Eliz. before the fictitious lease had been allowed. The husband and wife made a lease, but actual possession under it being necessary according to the practice of that day, instead of delivering it in person, the wife made a power of attorney for that purpose. The husband then sued, laying the demise jointly from himself and wife. Popham, Fenner, and Yelverton, JJ., held that, as the wife could not make an attorney, there was no delivery of possession as to her, and therefore the proof varied from the declaration. They added, the lease is only the lease of the husband; but they did not at all question that had the declaration contained a count on his sole demise, he might have recovered.

On the whole, I do not think there is any foundation for a new trial to be found in any of the points taken. One of them ob-

jects that the verdict is against the weight of evidence, and it is said the preponderance is decidedly in favor of the accuracy of the Lawrence survey; and another, that Murray McConnell and Amy Carpenter, witnesses for the defendant, are to receive credit in preference to Hartline, a witness for the plaintiff, who, if he contradicts them, was effectually impeached. There was a very striking conflict of testimony between the surveyors and others in respect to the Ludley and Lawrence lines; and some of the testimony in favor of the plaintiff was derivable from the admissions and acts of the defendant himself. In my opinion, the jury might well regard the testimony of Hartline as contradicting Murray McConnell and Amy Carpenter, especially the former; and it was entirely their office to say what degree of credit they would accord to each. Aside from the documental evidence, all the questions in the case were eminently proper to be submitted to the jury; they were so submitted; and the finding of the jury is precisely such as we can not disturb without a plain encroachment upon their province.

New trial denied.

DEED TO HUSBAND AND WIFE constitutes them not tenants in common or joint tenants but tenants of the entirety, with an absolute right of survivorship that can not be destroyed by the alienation of either during their joint lives: *Miller v. Miller*, 9 Abb. (N. S.) 447; *Goelet v. Gori*, 31 Barb. 320; *Dickinson v. Codwise*, 1 Sandf. Ch. 222; *Dias v. Glover*, 1 Hoff. 77. See also *De Pierres v. Thorn*, 4 Bosw. 294; *Meeker v. Wright*, 11 Hun, 535, relying upon the principal case. To the same effect see *Taul v. Campbell*, 27 Am. Dec. 508, and note 514, reviewing the prior decisions in this series.

RIGHT OF POSSESSION TO AN ESTATE HELD IN ENTIRETY IS IN THE HUSBAND, who may dispose of the same for his life as he pleases: *Beach v. Hollister*, 3 Hun, 520; *Farmers' and Mechanics' Nat. Bank of R. v. Gregory*, 49 Barb. 162; *Snyder v. Sponable*, 1 Hill, 569.

METES AND BOUNDS will control the quantity mentioned in a conveyance: *Roak v. Puff*, 3 Barb. 357.

SILENT ACQUIESCENCE IN AN ADVERSE POSSESSION to an erroneous line may in a proper case, go to the jury as evidence of a grant, but such evidence can not be conclusive unless the possession has lasted twenty years: *Miner v. Mayor etc. of New York*, 37 N. Y. Supr. Ct. 189, relying upon the principal case.

The principal case has been likewise cited in *Cook v. Rawdon*, 6 How. 234.

DESCRIPTION BY MONUMENTS that are permanent, visible, and well ascertained, and by courses and distances, will control the further description of lands as being bounded by the lands of certain specified persons: *Benedict v. Gaylord*, 29 Am. Dec. 299. Natural objects will control courses and description in the determination of the position of boundaries: *Hurley v. Morgan*, 28 Id. 579 and note 584, where the prior decisions in this series are collected. See also the note to *Heaton v. Hodges*, 30 Id. 734, where the whole subject is considered at length.

WEBBERS' EXECUTORS v. BLUNT.

[19 WENDELL, 133.]

PROMISE TO INDEMNIFY A SHERIFF FOR RELEASING A DEFENDANT from arrest is void as against public policy. The sheriff must obey his writ and can not take indemnity for refusing to obey it, although the person making the promise falsely informs him that the process had been satisfied.

ACTION to recover on an alleged agreement made with Webbers as sheriff, that if he would release E. M. Blunt from arrest under an attachment, the defendant, Joseph Blunt, would indemnify Webbers from all loss. It was alleged that Joseph Blunt represented that the attachment had been satisfied and was wrongfully and improperly issued ; and he thereby and by agreeing to indemnify Webbers, procured the latter to release E. M. Blunt from custody. That Webbers had been sued for the release, and compelled to pay four hundred dollars, which defendant failed to repay, etc. Demurrer to the declaration and rejoinder.

S. Stevens, for the defendant.

J. A. Spencer, for the plaintiff.

By Court, COWEN, J. Admitting the discharge to have been lawful, the third count is clearly bad. It represents the defendant a mere volunteer on a past consideration, a discharge from the attachment without his request: 1 Chit. Pl. 263, ed. of 1823, and the cases there cited, and for the exclusive benefit of a third person, promising to indemnify the sheriff. It is true we must intend that this promise was in writing; but written or unwritten, being a mere *nudum pactum*, there is neither principle nor authority in the law which goes in the least to sustain it.

The first and second counts are good, provided the sheriff acted lawfully in discharging the defendant's father, on the representation that the attachment had wrongfully issued. Neither count alleges anything more in substance, though according to the allegation in the first; the defendant added that the costs had been paid. In either case, the question is, whether the sheriff was authorized on any mere representation of the defendant to disobey the process of the law?

Were the question one of mere civil right respecting a matter collateral to the writ, like the taking of property under a *fieri facias* supposed to be sold by the execution debtor in order to defraud his creditors, I should not be disposed to deny that a promise of indemnity would be valid, where the sheriff, as he is alleged to have done in this instance, had acted in good faith:

Placket v. Gresham, 3 Salk. 75. Yet it requires no effort to see that such a case would be very different from his taking the word of the defendant's son, or any other person, that there is error or irregularity in the process itself, and sitting in judgment upon the act of his superiors, and determining the question whether the command in the writ shall be obeyed or disobeyed: *Scott v. Shaw*, 13 Johns. 378; *Hinman v. Brees*, Id. 529. A willful disobedience, even to the civil process of the court, is such an abuse as would not only subject the sheriff to punishment as for a contempt, but to an indictment. It is a violation of his oath of office. The question is whether he could escape such a consequence, because some one tells him that there is somewhere a secret vice in the line of proceedings, by which the writ may be avoided. Would any court listen to such a defense for a moment? Even if the allegation were true, it could not be set up and inquired into collaterally. The writ would be holden valid until set aside by the authority from which it emanated: *Hinman v. Brees*, 13 Johns. 529, 531; *per* Van Ness, J. in *Cable v. Cooper*, 15 Id. 152; *Jones v. Cook*, 1 Cow. 309. Indeed it was held in this very matter on an action for the escape, that it was no defense for Webbers to say that the attachment was irregular because the debt had been paid or discharged, and Mr. Justice Nelson cited several authorities to that point: *Ames v. Webbers*, 8 Wend. 545, 547.

It follows, then, that this promise is void on the ground of public policy. It is said in *Placket v. Gresham*, 3 Salk. 75, "Where a sheriff takes a bond as a reward for doing a thing, 'tis void, for it may be to warrant him in the breach of his duty." At common law he could not even refuse to execute process till his fees were paid, and if he did, he was held indictable for extortion; and this was said both of *ca. sa.* and a *fi. fa.*: *Hescott's case*, 1 Salk. 330; *Anon.*, Id. 331, case 5. In the *Queen v. Belwood*, 11 Mod. 80, the sheriff was held indictable for a voluntary escape of one committed to ward under the warrant of a justice of the peace. Allowing sheriffs to grant the indulgence claimed in the case at bar, besides being a disobedience of the writ, would lead to all manner of extortion as in old times, and before the passing of the act 23 Hen. VI., against taking bonds *colore officii*. This may be seen in the vivid picture of practices which is given by Montague, C. J., in *Dive v. Maningham*, Plowd. Com. 67; at page 68, he considers the taking of indemnities against escapes as extortion. The question there was upon a bond taken by a sheriff for a prisoner's appearance on

an execution; and the chief justice says, the prisoner not being bailable, the sheriff took the bond unduly, and *colore officii sui*, which is always taken in *malam partem*, and signifies an act badly done under the countenance of an office, and it bears a dissenting visage of duty, and is properly called extortion. "Wherefore," he adds, "here, inasmuch as the obligation was made for the deliverance of T. M., who was in the custody of the plaintiff as officer, it can not be denied but that he took the obligation for his deliverance *colore officii*." And what is our own statute on the subject, 2 R. S. 214, sec. 60, 2d. ed.? It is, that "no sheriff or other officer shall take any bond, obligation, or security, by color of his office, in any other case or manner than such as are provided by law; and any such bond, obligation, or security, taken otherwise than as herein directed, shall be void." This statute is even much broader, both as to subject-matter and persons, than the 23 Hen. VI., which may be seen recited at large and much commented upon in *Dive v. Maningham*. There are also several cases in this court which hold, that any security taken by the sheriff out of the regular course of the execution will be void: *Orange Co. Bank v. Wakeman*, 1 Cow. 46, 47, and cases cited in note (a) there; *Mumford v. Armstrong*, 4 Id. 553. This is not the case of taking a security with the assent of the plaintiff in the writ, or, which is the same thing, where the plaintiff adopts a security taken without his original assent, as in *Armstrong v. Garrow*, 6 Cow. 465. In *Mosdel v. Middleton*, 1 Vent. 237, it is said a sheriff can not take a bond from a prisoner even for his fees, because it would give him an opportunity to extort.

There can be no doubt that the promises declared on were merely void, on the plaintiff's own showing.

Judgment for defendant.

COLORE OFFICII.—An agreement with a sheriff to obtain an indulgence not allowed by law or an agreement in contemplation of an escape from arrest, is void as amounting to an agreement for indemnity against a breach of duty: *Winter v. Kinney*, 1 N. Y. 367; *Decker v. Judson*, 16 Id. 443; *Morton v. Campbell*, 14 Abb. 414; S. C., 37 Barb. 182. So a sheriff's contract not to sell under an execution before the lapse of a stated period is void: *Perkins v. Proud*, 62 Barb. 429. And if a bond is exacted by the provost-marshal, in charge of enlisted men, conditioned that they shall not desert, the bond is void as having been obtained *colore officii*: *Richardson v. Crandall*, 48 N. Y. 349; see also *Kellogg v. McCormick*, 2 E. D. Sm. 511.

But if a sheriff is authorized in a certain case to take a bond with two securities and instead takes a bond with one only, this is a mere irregularity and will be cured, if the person for whose benefit the bond was taken accepts it: *Morton v. Campbell*, *supra*.

BENDERNAGLE v. COCKS.

[19 WENDELL, 207.]

SEPARATE ACTIONS MAY BE BROUGHT by the same plaintiff upon separate and independent contracts in his favor, subject, however, to the power of the court to direct their consolidation in proper cases.

SEPARATE ACTIONS FOR INSTALLMENTS OF MONEY due at different times on the same contract, may be sustained if the action be in covenant or assumpsit; but if the action be in debt it must be for the whole.

RECOVERY FOR PART OF AN ENTIRE DEMAND merges the whole and bars any further recovery thereof.

SUMS DUE ON A CURRENT OR BOOK ACCOUNT constitute one entire, indivisible demand.

ONE ACTION ONLY MAY BE MAINTAINED for demands already due in the same contract, as for damages arising from a single wrong, although such demands may have fallen due or such damages have developed at different times.

SEPARATE ACTIONS MAY BE SUSTAINED for each of several separate, independent injuries or wrongs.

ACTION commenced in April, 1835, for breach of covenants alleged to have been made by Bendernagle in respect to a lease made by him to Cocks. Bendernagle had covenanted to pay for one third of the manure which Cocks should bring on the leased premises during the continuance of the lease, also to pay twenty-five dollars for plowing and working a certain lot during the first year. In abatement Bendernagle pleaded a prior action of covenant brought in February, 1834, on the same lease for alleged breach by him of the covenants thereof. To this Cocks replied that the covenants before sued upon were other, distinct, and different from those on which this action was based. Demurrer was interposed to this replication. Demurrer overruled and judgment given for plaintiff. Defendant Bendernagle sued out a writ of error.

C. O'Connor, for the plaintiff in error.

W. S. Sears, for the defendant in error.

By Court, COWEN, J. The point raised by this demurrer has been very fully considered in the course of the conflicting opinions delivered by two of the learned judges in the court below, and the arguments of counsel here. We have been furnished with all the New York authorities, and nearly all the English which bear upon the point. In respect to separate and independent contracts, the books agree that separate actions, whether the proper form be covenant, assumpsit, or debt, may be brought at the pleasure of the party, subject only to the power of the courts to

direct them to be consolidated in proper cases: *Phillips v. Berick*, 16 Johns. 136 [8 Am. Dec. 299]; *Badger v. Titcomb*, 15 Pick. 409 [26 Am. Dec. 611]; *Rex v. The Sheriff of Herefordshire*, 1 Barn & Adol. 572.¹ With respect to installments of money due at successive days under the same contract, a difference is taken, that if the action be debt, it must be brought for the whole: *Rudder v. Price*, 1 H. Bl. 550; *per Wilde, J.*, 15 Pick. 413; but if it be covenant or assumpsit, the action may be for each successive installment as it falls due: *Cooke v. Whorwood*, 2 Saund. 337; *Badger v. Titcomb*, 15 Pick. 409; *Ashford v. Hand*, Andr. 370. And so without doubt, as to any other breaches of several covenants or promises contained in the same contract, provided the action be brought before the subsequent breaches are committed. The cases all agree that where the demand is entire, a recovery for part bars a suit for the whole: *Willard v. Sperry*, 16 Johns. 121; *Brockway v. Kinney*, 2 Id. 210; *Farrington v. Payne*, 15 Id. 432; *Bates v. Quattebom*, 2 Nott & M. 205; *Hite v. Long*, 6 Rand. 457 [18 Am. Dec. 719]; *Smith v. Jones*, 15 Johns. 229; *Miller v. Covert*, 1 Wend. 487; *Ingraham v. Hall*, 11 Serg. & R. 78; *Fetter v. Beale*, 1 Salk. 11; *Barwell v. Kenscy*, 3 Lev. 179. The difficulty lies in discriminating between entire and several demands. I have been able to find but one case which holds that there being several breaches of the same contract already committed, the party may bring a several action for each. That is the case of *Badger v. Titcomb*, 15 Pick. 409 [26 Am. Dec. 611], which will be noticed by and by. On the contrary, I think the decisions of this court in respect to accounts involve the opposite doctrine: *Guernsey v. Carver*, 8 Wend. 492 [24 Am. Dec. 60]; *Colvin v. Corwin*, 15 Id. 557. They go upon the ground that dealings between parties in a current account make but one entire contract; and therefore a suit and recovery for part, the whole being due, shall be a bar to the whole. It is an entire demand, incapable of division: *Per Nelson, J.*, 8 Wend. 494. Yet every additional item in the account is in nature of a distinct installment. The obvious principle is, that several claims already due under the same contract, shall be deemed one entire demand or cause of action. In the late case of *Colvin v. Corwin*, 15 Id. 557, the two demands were distinct as to time and place, being several purchases of lottery tickets by the defendant at two different lottery offices of the plaintiffs, and of different agents; yet both being due, it was held that an action for one item barred a subsequent suit for the other. The chief justice speaks

1. 1 Barn & Adol. 572.

of the two suits as the splitting of a small demand. Yet suppose that one of these items had not been due at the time of the first suit, clearly the objection would have been removed. I venture to say that the courts have, with few exceptions, acted upon this distinction ever since: *Girling v. Aldas*, 2 Keb. 617, A. D. 1670, in B. R., 22 Car. II. That case is thus reported: "Coleman opposed a prohibition to the honor of Ale on splitting of actions because the party was insolvent, and the contracts really several on several deliveries of ale by Maltster to Alewife. *Sed non alle catur*, but *per curiam* a prohibition must be awarded. If the causes may be joined in one action they must, and a prohibition was awarded." In the late case of *McLaughlin v. Hill*, 6 Vt. 20, without denying the general rule, the court saved from its operation those items of account which were not due, and therefore not submitted to the justice in the first suit: *Avery v. Fitch*, 4 Conn. 362, S. P. The same rule, with another proper exception, will be found to have been acted upon and illustrated in *Bagot v. Williams*, 3 Barn & Cress. 235.

I admit that *Badger v. Titcomb*, 15 Pick. 409, is opposed to this rule, and goes the whole length of sustaining the replication of the plaintiff below. It is sufficient to reply, that in doing so, it was necessary, as was done in that case, to deny that *Guernsey v. Carver* was rightly decided by this court. The learned judge who delivered the opinion of the court in the former case observes: "We know of no principle of law, nor any other decided case on which the decision in that case [*Guernsey v. Carver*] can be sustained." Were there such a total absence, both of principle and authority, as is here intimated, we might well distrust the propriety of farther adhering to that decision. But with great deference, I had supposed *Girling v. Aldas*, before cited, from 2 Keble, to be plain in principle against the splitting up of accounts or different demands arising under the same contract; and to go the length of absolutely forbidding it to be done. This will be seen more distinctly by the report of the same case in 1 Sid. 73, by the title of *Girling v. Alders*. "The case was one contracted with another for divers parcels of malt, the money to be paid for each parcel being under forty shillings; and he levied divers complaints thereupon. Wherefore, the court here granted a prohibition; because, though they be several contracts, yet, forasmuch as the plaintiff might have joined them all in one action, he ought so to have done, and sued here, and not put the defendant to an unnecessary vexation, no more than he can split an entire debt into divers, to give the inferior

court jurisdiction in *fraudem legis*." The same rule is put in the same book: *Anon.* 65. In one view, and taken literally, these books may seem to go too far; but although they speak of several contracts, they evidently mean separate demands growing out of one general contract, or a course of dealing or account current between the parties. For the purpose of an action they make but one demand. It is the same thing, in effect, whether the splitting of this demand be restrained by prohibition or by allowing the first suit to be pleaded in abatement or in bar of the second. It is but a difference in the remedy. *Bagot v. Williams* adopts the latter remedy. Lord Bagot's steward (Williams) had received various sums of money at different times, in 1822, for the use of his principal. The sums which he received for sales of timber exceeded three thousand four hundred pounds. This, with two other sums, made in the whole seven thousand pounds, which Lord Bagot's agent knew, when he sued in debt for only four thousand pounds, in the name of Lord Bagot against Williams in the court baron of Ruthin. Judgment passed by default, and the plaintiff's agent verified and took judgment for three thousand four hundred pounds only. After that judgment was obtained, the plaintiff's agent discovered that the defendant had also received forty-six pounds for rent due at Christmas, 1821. On a suit being brought in the king's bench for the balance of the account, the former suit was pleaded in bar as being for the same identical cause of action, on which issue was joined; and the plea was sustained on evidence of these facts except as to the forty-six pounds.

Garrow, B., who tried the cause, was of opinion "that whatever constituted a subsisting debt at the time when the proceeding in the inferior court was instituted, and was known to be so by the agent who managed the whole transaction, was to be considered as included in and constituting one entire cause of action," and he directed a verdict for the plaintiff, for only forty-six pounds. On motion for a new trial, Abbott, C. J., assumed that the form of action in the court below might have been what he calls a *concessit solvere*, including the same causes of action which were the subject of the second suit; and he considered the acts of the agent with a knowledge of all the facts, as equivalent to a submission of the same facts to a jury, and their finding a balance of only three thousand four hundred pounds. Bayley, J., took a broader ground, and I think went the same length with the learned baron who tried the cause. He observes: "In this case Lord Bagot, at the time when the first

action was commenced, had a demand on the defendant, not for one specific sum of money, but for different sums of money received by the defendant on his account, from different persons and at different times. His agent knew that he had claims in respect of all these sums now claimed except forty-six pounds; and having that knowledge, he formed an opinion that three thousand four hundred pounds was the whole sum that Lord Bagot ought to claim; and if he acted upon that opinion, it is much the same thing as if the plaintiff in a cause at *nisi prius* having a demand of sixty pounds, consisting of three sums of twenty pounds, which became due to him at different times, consented to take a verdict for forty pounds. If the jury in such a case, at the suggestion of the plaintiff, reduced the verdict to forty pounds, he would be bound by it, and could not afterwards bring a second action for the other twenty pounds. It seems to me that he is equally bound by his own act in this case, as he would have been by a verdict of a jury in the other; and that having chosen to abandon his claim once, he has done it forever." Holroyd, J., concurred, and a new trial was denied. Now I understand a majority of the judges here to put the case upon the simple facts that Lord Bagot had a claim for several sums resting in account, and chose to sue for some of them. Accordingly, in *Bunnel v. Pinto*, 2 Conn. 431, where the parties submitted their accounts to arbitrators, who awarded, and the plaintiff sued for forty dollars not included in the award, this was held a bar to the action; and Swift, C. J., remarks, that "a book account is an indivisible claim, as much as a promissory note; and a party may as well pretend that he kept back a part of his claim on a note, and then, after the award, bring a suit upon it." Hosmer, J., and the rest of the court, it is true, do not in terms accede to the proposition, but in the subsequent case of *Avery v. Fitch*, 4 Id. 362, the whole court, with Hosmer, (now) C. J., at their head, not only adopt and repeat it, but I think take a distinction which goes the whole length of maintaining the plea now in question.

To an action on book, the plea was that by writ dated July 9, 1819, the plaintiff brought an action on book against the defendant, demanding seven dollars, and on the general issue recovered judgment. Replication that the account of seven dollars accrued and fell due after the commencement of the suit in which the recovery was pleaded. Hosmer, C. J., delivered the opinion of the court. He said: "For the same cause of action, no person ought to recover twice; and if it might have been ex-

hibited in a former suit as part of a book debt then litigated, it must be considered as extinguished. A man can not be permitted to sever a book debt and multiply suits unnecessarily. The case of *Lane v. Cook*, 3 Day, 255, settled this principle: that a judgment in an action of book debt is conclusive, 'as to all matters on book subsisting between the parties, at the date of the writ on which judgment was rendered.' But a cause of action which originated posterior to the commencement of a suit can not be affected by the judgment rendered in it, as it was not exhibited in evidence, nor could form any part of the matter on which the suit was instituted." Looking, as I think we must, on the several defaults to pay items, as so many successive breaches of a single contract, we here have an authority for saying that all such breaches are but parts of one indivisible demand, so far as they were committed at the commencement of the suit.

I must, therefore, be permitted to believe, that *Guernsey v. Carver* is not without principle and authority in its support, and that it was very properly followed in *Stevens v. Lockwood*, 13 Wend. 644 [28 Am. Dec. 492], and other cases in this court. I admit that the case of *Rex v. The Sheriff of Herefordshire*, 1 Barn. & Adol. 672, is not without an appearance of conflict with the other English cases. A. became indebted to B., less than forty shillings (the jurisdiction of the sheriff's court), for carriage of goods, and less than forty shillings for like carriage one month after. B. sued for each separately in the sheriff's court; and the king's bench held the two sums to be distinct debts, and denied a prohibition; *Girling v. Alders* was cited in support of the motion; nor was its authority denied; nor was that of *Bagot v. Williams*. Two such remote and distinct instances of dealing might have been viewed as not coming within the rule which forbids the splitting of a continuous account, much less as making parts of one express contract. The rule may differ in its results, accordingly as courts give it a more restricted or a more liberal application. *Rex v. The Sheriff of Herefordshire*, seems to be an instance of the former; *Colvin v. Corwin*, in this court, of the latter. The two cases may not stand together in their circumstances; but the rule itself appears to be as fully recognized in England as in this state; and being of a remedial tendency, by contributing to reduce a vexatious multiplicity of suits, it should be liberally applied. No such uncertainty, however, can arise in applying the rule to different claims arising upon the same express contract.

The case of *Young v. Munby*, 4 Mau. & Sel. 183, cited for the

defendant in error, would be in point against this plea, if the action had been on contract. But it was an action on the case brought by the rector against the executor of his predecessor, upon the law and custom of England, to recover damages for dilapidations of the chancel and a pew. The plea in bar was that the plaintiff had before sued and recovered against the same defendant for not repairing the rectory house, outhouses, and cottages belonging to the rectory, and the gates and hedges upon the glebe lands. The replication denied that the damages now sought to be recovered were in any manner included in the former declaration, and that the same or any part thereof were recovered in the former action. On demurrer the plea was held bad, but the action was evidently for a mere tort. All the instances put by Tindal, who argued in support of the plea, are founded upon cases relative to torts; and Lord Ellenborough, C. J., said: "They are different and independent injuries in respect of the different parts. The injury from the dilapidation of the house is one thing; that from the dilapidation of the chancel is another." It is true the same thing may be said in respect to different breaches of the same contract; but there the parties have tied them together and made them one by their own agreement.

I admit that the rule does not extend to several and distinct trespasses or other wrongs: *White v. Moseley*, 8 Pick. 356; nor as we have seen, to distinct contracts. It goes against several actions for the same wrong, and against several actions on the same contract. All damages accruing from a single wrong, though at different times, make but one cause of action, and all debts or demands already due by the same contract make one entire cause of action. Each comes under the familiar rule, that if a party will sue and recover for a portion, he shall be barred of the residue. Proof of that fact would sustain the common issue as presented in *Bagot v. Williams*, that the plaintiff had before impleaded the defendant, and recovered for the same identical cause of action, etc. The plea of a former judgment in an action for a part of such entire demand, being valid as a plea in bar to the whole, it follows that a plea of the pendency of such an action is good in abatement for the whole. Both stand upon the same principle; the only difference lies in the form of the pleas and the effect of the judgments respectively.

The judgment of the court below must be reversed.

AN ENTIRE DEMAND CAN NOT BE SPLIT UP so as to authorize the bringing of several suits thereon; in all such cases the judgment in the first action in

which a part of the demand was put in suit, can be pleaded in bar to any subsequent action: *Clark v. Jones*, 1 Denio, 519; *Staples v. Goodrich*, 21 Barb. 318; *Colburn v. Woodworth*, 31 Id. 384; *Bancroft v. Spear*, 44 Id. 216; *Cogins v. Bulwinkle*, 1 E. D. Sm. 437; *Secor v. Sturgis*, 2 Abb. 75; S. C., 16 N. Y. 554; *Mason v. Alston*, 9 Id. 31; *Oliver v. Holt*, 11 Ala. 578; *O'Neill v. Brown*, 21 Id. 485; *Erwin v. Lynn*, 16 Ohio St. 546; *Stein v. Prairie Rose*, 17 Id. 475. Nor is it allowed a party in one action to treat a contract as rescinded and in another to sue for a breach thereof; thus he can not bring a *quantum meruit* for services actually rendered, and then bring an action for damages for the breach of the special contract under which the services were originally performed: *Mooly v. Leverich*, 14 Abb. (N. S.) 153. But causes of action arising on distinct contracts, though these had their origin in the same transaction, need not be joined in one suit: *Hughes v. Alexander*, 5 Duer, 492. A breach of an entire contract will entitle to only one action, for it will be considered that thereby the contract is entirely destroyed; therefore, where a covenant to supply water for the use of a mill was disregarded, an action brought upon the contract was held to entirely determine it, and no subsequent action could be brought for the continued failure to supply the water: *Fish v. Foley*, 6 Hill, 56; *Atwood v. Norton*, 27 Barb. 647, relying upon the principal case. But a contract may be continuing and be not determined by the first breach. Such would be the case of the grant of a right of way to which would be annexed a covenant to erect a gate at the terminus of the way, and keep it in repair. Here an action for damages because of a failure to keep the gate in proper repair would be no bar to a subsequent action for a subsequent failure to repair: *Beach v. Cram*, 2 N. Y. 86. It might be no easy matter, however, to formulate the distinction between this case and that of the covenant to furnish a continued water supply.

WHERE SEVERAL COVENANTS ARE INCLUDED IN THE SAME INSTRUMENT, though suits may be instituted for the breach of each covenant, yet every action must include all breaches that have occurred to the time of its institution: *Yates v. Fassett*, 5 Denio, 28; *Joyce v. Moore*, 10 Mo. 273. In *McIntosh v. Lowm*, 49 Barb. 550, however, it was held that if the covenants were entirely independent, no necessity existed of joining the separate causes of action in one suit, and the intimations of the principal case that the rule was otherwise were disapproved of.

ITEMS OF AN ACCOUNT CONSTITUTE BUT ONE ENTIRE DEMAND, and therefore if a suit has been brought to recover on some of the items contained therein that may be used as a defense to a subsequent action for other items: *Bourgesser v. Harrison*, 12 Wisc. 548, relying upon the principal case. To the same effect is *Guernsey v. Carver*, 24 Am. Dec. 60, and note 61.

HOLLISTER v. NOWLEN.

[19 WENDELL, 234.]

FOR INJURY TO A PASSENGER, STAGE-COACH PROPRIETORS are liable only for want of proper care, diligence, and skill.

OF BAGGAGE STAGE-COACH PROPRIETORS ARE INSURERS and are answerable for any loss not resulting from public enemies or inevitable accident; the presence of the owner or his sending his servant to look after the property does not constitute an exception to the rule, there being no fraud on the part of the owner.

NOTICE THAT BAGGAGE WOULD BE AT THE RISK OF THE OWNER, printed and placarded at the public offices of a stage company, will not limit its liability as a common carrier.

COMMON CARRIER CAN NOT REJECT OR RECEIVE a customer at pleasure.

CARRIER'S LIABILITY IS DETERMINED BY THE POLICY OF THE LAW and he is liable independent of his contract.

FALSE ANSWER AS TO VALUE OF GOODS INTRUSTED TO A COMMON CARRIER is a fraud upon him, and may exonerate him from making good a loss not chargeable to his neglect or misconduct.

GENERAL NOTICE THAT CARRIER WILL NOT BE RESPONSIBLE for baggage does not restrict his liability, nor does it create a presumption of an implied contract not to hold him answerable for baggage.

ACTION for loss of trunk and its contents. Defendant was a common carrier by stage-coach. Public notice that baggage would be at the risk of the owner was printed and placarded in the stage office and the principal public houses, and had been for the past three years, in the town where plaintiff resided. On July 20, 1833, before daylight, the plaintiff left Avon in defendant's coach, for Buffalo. His trunk was placed in the boot and carefully fastened. After proceeding three miles it was ascertained that the fastenings had been cut and the trunk and contents stolen.

C. P. Kirkland, for the plaintiff.

M. T. Reynolds and P. Gridley, for the defendant.

By Court, BRONSON, J. Stage-coach proprietors, and other carriers by land and water, incur a very different responsibility in relation to the passenger and his baggage. For an injury to the passenger, they are answerable only where there has been a want of proper care, diligence, or skill; but in relation to baggage they are regarded as insurers, and must answer for any loss not occasioned by inevitable accident, or the public enemies. As the point, though made, was not discussed by the defendant's counsel, I shall content myself with referring to a few cases to prove that they are liable, as common carriers, for the loss or injury of the property of the passenger: *Orange Co. Bank v. Brown*, 9 Wend. 85 [24 Am. Dec. 129]; *Camden Company v. Burke*, 13 Id. 611 [28 Am. Dec. 488]; *Brooke v. Pickwick*, 4 Bing 218; 4 Esp. 177; 2 Kent, 601. The fact that the owner is present, or sends his servant to look after the property, does not alter the case: *Robinson v. Dunmore*, 2 Bos. & Pul. 418. *Chambre, J.* said: "It has been determined, that if a man travel in a stage-coach and take his portmanteau with him, though he

has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost." The liability of a carrier is like that of an inn-keeper; and it was said in *Cayle's case*, 8 Co. 63,¹ that "it is no excuse for the inn-keeper to say that he delivered the guest the key of the chamber in which he lodged, and that he left the door open; but he ought to keep the goods and chattels of his guest there in safety." When there is no fraud, the fact that the owner accompanies the property, can not affect the principle on which the carrier is charged in case of loss.

The principal question in the cause arises out of the notice given by the coach proprietors, that baggage carried by the telegraph line would be at the risk of the owner; and the first inquiry is, whether there was sufficient evidence to charge the plaintiff with a knowledge of the notice. If we are to follow the current of modern English decisions on this subject, it can not be denied that there was evidence to be left to a jury, and upon which they might find that the plaintiff had seen the notice. But I think the carrier, if he can by any means restrict his liability, can only do so by proving actual notice to the owner of the property. I agree to the rule laid down by Best, C. J., in *Brooke v. Pickwick*, 4 Bing. 218, decided in 1827, when the courts of Westminster hall had commenced retracing their steps in relation to the liability of carriers, and were endeavoring to get back on to the firm foundation of the common law. He said: "If coach proprietors wish honestly to limit their responsibility, they ought to announce their terms to every individual who applies at their office, and at the same time to place in his hands a printed paper, specifying the precise extent of their engagement. If they omit to do this, they attract customers under the confidence inspired by the extensive liability which the common law imposes upon carriers, and then endeavor to elude that liability by some limitation which they have not been at the pains to make known to the individual who has trusted them."

I should be content to place my opinion upon the single ground, that if a notice can be of any avail, it must be directly brought home to the owner of the property; and that there was no evidence in this case which could properly be submitted to a jury to draw the inference, that the plaintiff knew on what terms the coach proprietor intended to transact his business. But other questions have been discussed; and there is another

1. *Cayle's case*, 8 Co. 32.

case' before the court where the judge at the circuit thought the evidence sufficient to charge the plaintiff with notice. It will therefore be proper to consider the other questions which have been made by the counsel.

Can a common carrier restrict his liability by a general notice, in any form, brought home to the opposite party? Without intending to go much at large into this vexed question, it will be necessary to state some leading principles relating to the duties and liabilities of the carrier, and the ground upon which his responsibility rests. The rules of the common law in relation to common carriers are simple, well defined, and what is no less important, well understood. The carrier is liable for all losses except those occasioned by the act of God or the public enemies. He is regarded as an insurer of the property committed to his charge, and neither destruction by fire, nor robbery by armed men, will discharge him from liability. Holt, C. J., in pronouncing his celebrated judgment in the case of *Coggs v. Bernard*, 2 Ld. Raym. 918, said: "This is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing." In *Forward v. Pillard*, 1 T. R. 27, where the carrier was held liable for a loss by fire, Lord Mansfield said, that "to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightnings, and tempests." And in relation to a loss by robbery he said: "The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil." The rule has been fully recognized in this state: *Coll v. McMechen*, 6 Johns. 160 [5 Am. Dec. 200]; *Elliot v. Rossell*, 10 Id. 1 [6 Am. Dec. 306]; *Kemp v. Coughtry*, 11 Id. 107. In *Roberts v. Turner*, 12 Id. 232 [7 Am. Dec. 311], Spencer, J., said, the carrier "is held responsible as an insurer of the goods, to prevent combinations, chicanery, and fraud."

A common carrier exercises a public employment, and consequently has public duties to perform. He can not, like the tradesman or mechanic, receive or reject a customer at pleasure, or charge any price that he chooses to demand. If he refuse to receive a passenger or carry goods according to the course of his particular employment, without a sufficient excuse, he will be

1. *Cole v. Goolwin and Story*, 19 Wend. 251; 8. C., *post*.

liable to an action; and he can only demand a reasonable compensation for his services, and the hazard which he incurs: 2 Ld. Raym. 917;¹ Bac. Abr., Carriers B, Skin. 279;² 1 Salk. 249, 250;³ 5 Bing. 217;⁴ 3 Taunt. 272,⁵ *per* Lawrence, J.; 2 Kent, 599; Story on Bail. 328; Jeremy on Carriers, 59.

It has been said that the carrier is liable in respect of his reward: *Lane v. Cotton*, 1 Salk. 143. Lord Coke says, "he hath his hire, and thereby implicitly undertaketh the safe delivery of the goods delivered to him:" Co. Lit. 89 a. The carrier may no doubt demand a reward proportioned to the services he renders and the risk he incurs; and having taken it, he is treated as an insurer, and bound to the safe delivery of the property. But the extent of his liability does not depend on the terms of his contract: it is declared by law. His undertaking, when reduced to form, does not differ from that of any other person who may agree to carry goods from one place to another; and yet, one who does not usually exercise this public employment, will incur no responsibility beyond that of an ordinary bailee for hire; he is not answerable for a loss by any means against which he could not have guarded by ordinary diligence. It is not the form of the contract, but the policy of the law which determines the extent of the carrier's liability. In *Ansell v. Waterhouse*, 2 Chit. 1, which was an action on the case against the proprietor of a stage-coach for an injury to the plaintiff's wife, Holroyd, J., said: "This action is founded on what is quite collateral to the contract, if any; and the terms of the contract, unless changing the duty of a common carrier, are in this case quite immaterial. The declaration states an obligation imposed upon him by the law. This is an action against a person, who, by an ancient law, held, as it were, a public office, and was bound to the public. This action is founded on the general obligation of the law." In *Forward v. Pittard*, 1 T. R. 27, Lord Mansfield said: "It appears from all the cases for one hundred years back, that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer." See also *Hide v. Proprietors etc.*, 1 Esp. 36.

The law in relation to carriers has in some instances operated

1. *Ceggs v. Bernard*.

2. *Boulston v. Sandiford*.

3. *Gisbourn v. Hurst*.

4. *Riley v. Horne*.

5. *Harris v. Packwood*.

with severity, and they have been charged with losses against which no degree of diligence could guard. But cases of this description are comparatively of rare occurrence; and the reason why they are included in the rule of the common law, is not because it is fit in itself that any man should answer without a fault, but because there are no means of effectually guarding the public against imposition and fraud, without making the rule so broad, that it will sometimes operate harshly. It was well remarked by Best, C. J., in *Riley v. Horne*, 5 Bing. 217, that "when goods are delivered to the carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to their place of destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves." These remarks lose little of their force when applied to the case of passengers in stages, steamboats, and railroad cars. For although they are in the neighborhood of their property, it is neither under their eye, nor have they any efficient means of protecting it against the consequences of negligence and fraud. The traveler is usually among strangers; his property is in the hands of men who are sometimes selected with little regard to their diligence and fidelity; and if the remedy of the owner in case of loss depend on the question of actual negligence or fraud, he must make out his right to recover by calling the very men whose recklessness or frailty has occasioned the injury. It was remarked by Best, C. J., in *Brooke v. Pickwick*, 4 Bing. 218, that "though coach proprietors of the present day are a respectable and opulent class, many of the persons employed by them resemble those whom the common law meant to guard against."

There is less of hardship in the case of the carrier than has sometimes been supposed; for while the law holds him to an extraordinary degree of diligence, and treats him as an insurer of the property, it allows him, like other insurers, to demand a premium proportioned to the hazards of his employment. The rule is founded upon a great principle of public policy; it has been approved by many generations of wise men; and if the courts were now at liberty to make instead of declaring the law, it may well be questioned whether they could devise a system,

which, on the whole, would operate more beneficially. I feel the more confident in this remark from the fact that in Great Britain, after the courts had been perplexed for thirty years with various modifications of the law in relation to carriers, and when they had wandered too far to retrace their steps, the legislature finally interfered, and in all its most important features restored the salutary rule of the common law.

The doctrine that a carrier might limit his responsibility by a general notice brought home to the employer prevailed in England for only a short period. In *Smith v. Horne*, 8 Taunt. 144, Burrough, J., said: "The doctrine of notice was never known until the case of *Forward v. Pittard*, 1 T. R. 27, which I argued many years ago." That case was decided in 1785, and it is remarkable that it does not contain one word on the subject of notice. If that question was in any form before the court, it is not mentioned by the reporter; and the decision was against the carrier, although the loss was occasioned by fire, without his default. The doctrine was first recognized in Westminster Hall, in 1804, when the case of *Nicholson v. Willan*, 5 East, 507, was decided. Lord Ellenborough said, the practice of making a "special acceptance" had prevailed for a long time, and that there was "no case to be met with in the books in which the right of a carrier thus to limit by special contract his own responsibility, has ever been by express decision denied." Whatever may be the rule where there is in fact a special contract, the learned judge could not have intended to say, that a carrier had for a long time been allowed to limit his liability by a general notice, or that a special contract had been implied from such a notice; for he refers to no case in support of the position, and would have searched in vain to find one. Only eleven years before (in 1793), Lord Kenyon had expressly laid down a different rule in *Hide v. Proprietors etc.*, 1 Esp. 36. He said, "There is a difference where a man is chargeable by law generally, and where on his contract. Where a man is bound to any duty and chargeable to a certain extent by the operation of law, in such case, he can not by any act of his own discharge himself." And he put the case of common carriers, and said, they can not discharge themselves "by any act of their own, as by giving notice, for example, to that effect." This case was afterwards before the king's bench, but on another point: 1 T. R. 389.¹

The doctrine in question was not received in Westminster Hall without much doubt, and although it ultimately obtained

something like a firm footing, many of the English judges have expressed their regret that it was ever sanctioned by the courts. Departing as it did from the simplicity and certainty of the common law rule, it proved one of the most fruitful sources of legal controversy which has existed in modern times. When it was once settled that a carrier might restrict his liability by a notice brought home to his employer, a multitude of questions sprung up in the courts which no human foresight could have anticipated. Each carrier adopted such a form of notice as he thought best calculated to shield himself from responsibility without the loss of employment; and the legal effect of each particular form of notice could only be settled by judicial decision. Whether one who had given notice that he would not be answerable for goods beyond a certain value unless specially entered and paid for, was liable in case of loss to the extent of the value mentioned in the notice, or was discharged altogether; whether, notwithstanding the notice he was liable for a loss by negligence, and if so, what degree of negligence would charge him; what should be sufficient evidence that the notice came to the knowledge of the employer, whether it should be left to the jury to presume that he saw it in a newspaper which he was accustomed to read, or observed it posted up in the office where the carrier transacted his business; and then, whether it was painted in large or small letters, and whether the owner went himself or sent his servant with the goods, and whether the servant could read; these, and many other questions were debated in the courts, while the public suffered an almost incalculable injury in consequence of the doubt and uncertainty which hung over this important branch of the law: See 1 Bell's Com. 474. After years of litigation, parliament interfered in 1830, and relieved both the courts and the public, by substantially re-asserting the rule of the common law: Stat. 1, Wm. IV., c. 68.

Without going into a particular examination of the English cases, it is sufficient to say that the question has generally been presented, on a notice by the carrier that he would not be responsible for any loss beyond a certain sum, unless the goods were specially entered and paid for; and the decisions have for the most part only gone far enough to say, that if the owner do not comply with the notice by stating the true value of the goods, and having them properly entered, the carrier will be discharged. In these cases, the carrier had not attempted to exclude all responsibility. But there are two *nisi prius* de-

cisions which allow the carrier to cast off all liability whatever. In *Maving v. Tbdd*, 1 Stark. 72, the defendant had given notice that he would not answer for a loss by fire, and such a loss having occurred, Lord Ellenborough thought that carriers might exclude their liability altogether, and nonsuited the plaintiff. In *Leeson v. Holt*, 1 Stark. 186, tried in 1816, he made a like decision; though he very justly remarked, that "if this action had been brought twenty years ago, the defendant would have been liable; since by the common law a carrier is liable in all cases except two." We have here, what will be found in many of the cases, a very distinct admission that the courts had departed from the law of the land, and allowed, what Jeremy's Treatise on Carriers, 35, 36, very properly terms "recent innovations."

Some of the cases which have arisen under a general notice have proceeded on the ground of fraud: *Batson v. Donovan*, 4 Barn. & Ald. 21; others on the notion of a special acceptance or special contract: *Nicholson v. Willan*, 5 East, 507; *Harris v. Packwood*, 3 Taunt. 271; while in some instances it is difficult to say what general principle the court intended to establish.

So far as the cases have proceeded on the ground of fraud, and can properly be referred to that head, they rest on a solid foundation; for the common law abhors fraud, and will not fail to overthrow it in all the forms, whether new or old, in which it may be manifested. As the carrier incurs a heavy responsibility, he has a right to demand from the employer such information as will enable him to decide on the proper amount of compensation for his services and risk, and the degree of care which he ought to bestow in discharging his trust; and if the owner give an answer which is false in a material point, the carrier will be absolved from the consequences of any loss not occasioned by negligence or misconduct. The case of *Kenrig v. Eggleston*, Aleyn, 93, was decided in 1649. The plaintiff delivered a box to the porter of the carrier, saying "there was a book and tobacco in the box," when it truth it contained one hundred pounds in money, besides. Rolle, J., thought the carrier was nevertheless liable for a loss by robbery; "but in respect of the intended cheat to the carrier, he told the jury they might consider him in damages." The jury, however, found the whole sum (abating the carriage), for the plaintiff, *quod durum videbatur circumstantibus*. In *Gibbon v. Paynton*, 4 Burr. 2298, Lord Mansfield said, this was a case of fraud and he "should have agreed in opinion with the *circumstantibus*." In *Tyly v.*

Morrice, Carth. 485, two bags of money sealed up were delivered to the carrier, saying they contained two hundred pounds, and he gave a receipt for the money. In truth the bags contained four hundred and fifty pounds, and the carrier having been robbed, paid the two hundred pounds; and in this action brought to recover the balance, the chief justice told the jury, that "since the plaintiffs had taken this course to defraud the carrier of his reward, they should find for the defendant." And the same point was decided in another action against the same carrier. In *Gibbon v. Paynton*, 4 Burr. 2298, one hundred pounds in money was hid in hay in an old nail-bag, which fact the plaintiff concealed from the carrier; and the money having been stolen, the court held that this fraud would discharge the defendant. In the case of the *Orange Co. Bank v. Brown*, 9 Wend. 85 [24 Am. Dec. 129], the agent of the plaintiffs put eleven thousand dollars in bank bills in his trunk, and delivered it to the captain of the steamboat as his baggage. The court held that the term baggage would only include money for the expenses of traveling, and not a large sum, as in this case, taken for the mere purpose of transportation; and it was said that the conduct of the plaintiff's agent was a virtual concealment as to the money, that "his representation of his trunk and the contents as baggage, was not a fair one, and was calculated to deceive the captain." The owner is not bound to disclose the nature or value of the goods; but if he is inquired of by the carrier, he must answer truly: *Phillips v. Earle*, 8 Pick. 182.

Fraud can not, I think, be imputed to the owner from the mere fact that he delivers goods after having seen a general notice published by the carrier, whatever may be its purport. If the carrier wishes to ascertain the extent of his risk, he should inquire at the time the goods are delivered; and then if he is not answered truly he will have a defense: See 4 Bing. 218. A different rule practically changes the burden of proof. At the common law, it is enough that the owner prove the undertaking of the carrier, and that the goods did not reach their destination. But this doctrine of implying fraud from a notice, requires him to go further, and show that he complied with the terms of the advertisement. He may have informed the carrier truly of the value of the goods: there may be no fraud, but still he is required to prove himself innocent before he can recover. Independent of a notice, the *onus* would rest, where upon general principles it ought to rest, on him who imputes fraud; and the carrier could not discharge himself without showing some actual

misrepresentation or fraudulent concealment. It does not lie on the employer to show how the loss was occasioned, or that he has acted properly; but the law presumes against the carrier, until he proves that the loss happened by means or under circumstances for which he is not answerable: 1 T. R. 33; *Murphy v. Staton*, 3 Munf. (Va.) 239; Story on Bail. 338.

But it is enough for this case, that the question of fraud can never arise under such a notice as was given by the defendant. He did not say to the public that he would not be answerable for baggage beyond a certain sum, unless the owner disclosed the value; he said he would not be answerable in any event. It was, in effect, a notice that he would not abide the liabilities which the law, upon principles of public policy, had attached to his employment. If the notice can aid the defendant in any form, it certainly does not go to the question of fraud.

The only remaining ground of argument in favor of the carrier is, that a special contract may be inferred from the notice. Independent of the modern English cases, it seems never to have been directly adjudged that the liability of the carrier can be restricted by a special contract. Nox (Maxims), 92, after speaking of a loss by negligence, says: "If a carrier would refuse to carry unless a promise were made to him that he should not be charged with any such miscarriage, that promise were void." If he can not stipulate for a partial, it is difficult to see how he can for a total exemption from liability. In *Nicholson v. Willan*, 5 East, 513, Lord Ellenborough found no direct adjudication in favor of the position that a carrier may limit his responsibility by a special contract; but he relied on the fact that such an exemption had never been "by express decision denied." Although this mode of reasoning is not the most conclusive, I shall not deny that the carrier may, by express contract, restrict his liability; for, though the point has never been expressly adjudged, it has often been assumed as good law: Aley, 93;¹ 4 Co. 84, note to *Southcote's case*; 4 Burr. 2301,² per Yates, J; 1 Vent. 190, 238;³ Peak. N. P. Cas. 150;⁴ 2 Taunt. 271;⁵ 1 Stark. 186.⁶ If the doctrine be well founded, it must, I think, proceed on the ground that the person intrusted with the goods, although he usually exercises that employment, does not in the particular case act as a common carrier. The parties agree that in relation to that transaction he shall throw off his public character, and like other bailees for hire, only be answerable for negligence or

1. *Kenrig v. Eggleston*.3. *Morse v. Slue*.5. *Harris v. Packwood*, 3 Taunt. 271.2. *Gibbon v. Paynton*.4. *Catley v. Winttingham*.6. *Leeson v. Holt*.

misconduct. If he act as a carrier, it is difficult to understand how he can make a valid contract to be discharged from a duty or liability imposed upon him by law.

But conceding that there may be a special contract for restricted liability, such a contract can not, I think, be inferred from a general notice brought home to the employer. The argument is, that where a party delivers goods to be carried after seeing a notice that the carrier intends to limit his responsibility, his assent to the terms of the notice may be implied. But this argument entirely overlooks a very important consideration. Notwithstanding the notice, the owner has a right to insist that the carrier shall receive the goods subject to all the responsibilities incident to his employment. If the delivery of goods under such circumstances authorizes an implication of any kind, the presumption is as strong, to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the carrier. If a coat be ordered from a mechanic after he has given the customer notice that he will not furnish the article at a less price than one hundred dollars, the assent of the customer to pay that sum, though it be double the value, may perhaps be implied; but if the mechanic had been under a legal obligation, not only to furnish the coat, but to do so at a reasonable price, no such implication could arise. Now the carrier is under a legal obligation to receive and convey the goods safely, or answer for the loss. He has no right to prescribe any other terms; and a notice can at the most only amount to a proposal for a special contract, which requires the assent of the other party. Putting the matter in the most favorable light for the carrier, the mere delivery of goods after seeing a notice, can not warrant a stronger presumption that the owner intended to assent to a restricted liability on the part of the carrier, than it does that he intended to insist on the liabilities imposed by law; and a special contract can not be implied where there is such an equipoise of probabilities.

Making a notice the foundation for presuming a special contract, is subject to a further objection. It changes the burden of proof. Independent of the notice, it would be sufficient for the owner to prove the delivery and loss of the goods; and it would then lie on the carrier to discharge himself by showing a special contract for a restricted liability. But giving effect to the notice, makes it necessary for the owner to go beyond the delivery and loss of the goods, and prove that he did not assent to the proposal for a limited responsibility. Instead of leaving

the *onus* of showing assent on him who sets up that affirmative fact, it is thrown upon the other party, and he is required to prove a negative, that he did not assent.

After all that has been or can be said in defense of these notices, whether regarded either as a ground for presuming fraud or implying a special agreement, it is impossible to disguise the fact that they are a mere contrivance to avoid the liability which the law has attached to the employment of the carrier. If the law is too rigid, it should be modified by the legislature and not by the courts. It has been admitted over and over again by the most eminent English judges, that the effect given to these notices was a departure from the common law; and they have often regretted their inability to get back again to that firm foundation. The doctrine that a carrier may limit his responsibility by a notice, was wholly unknown to the common law at the time of our revolution. It has never been received in this, nor, so far as I have observed, in any of the other states. The point has been raised, but not directly decided: *Barney v. Prentiss*, 4 Har. & J. 317 [7 Am. Dec. 670]; *Dwight v. Brewster*, 1 Pick. 50 [11 Am. Dec. 133]. Should it now be received among us, it will be after it has been tried, condemned, and abandoned in that country to which we have been accustomed to look for light on questions of jurisprudence.

The act of parliament already mentioned enumerates various articles of great value in proportion to the bulk, and others which are peculiarly exposed to damage in transportation, and declares that the carrier shall not be liable for the loss or injury of those articles when the value exceeds ten pounds, unless at the time of delivery the owner shall declare the nature and value of the property, and pay the increased charge which the carrier is allowed to make for his risk and care. If the owner complies with this requirement, the carrier must give him a receipt for the goods, "acknowledging the same to have been insured;" and if he refuse to give the receipt, he remains "liable and responsible as at the common law." The provision extends to the proprietors of stage-coaches as well as all other carriers, and to property which may "accompany the person of any passenger" as well as other goods; and the statute declares that after the first day of September, 1830, "no public notice or declaration heretofore made, or hereafter to be made, shall be deemed or construed to limit, or in any wise affect the liability at common law" of any carriers; but that all and every such carrier shall be "liable as at the common law to answer" for the loss or injury of

the property, "any public notice or declaration by them made and given contrary thereto, or in any wise limiting such liability, notwithstanding." The only modification of the common law rule in relation to carriers made by this statute, is that which requires the owner, without a special request, to disclose the nature and value of the package, when it contains articles of a particular description. The premium for care and risk, the carrier might have required before. In relation to all articles not enumerated, and in relation to those also, if the owner comply with the requirements of the act, the carrier is declared liable as an insurer, and must answer "as at the common law." The whole doctrine which had sprung up under notices, is cut up by the roots; and in such language as renders it apparent that the legislature deemed it an innovation on the law of the land.

If after a trial of thirty years the people of Great Britain, whose interests and pursuits are not very dissimilar to our own, have condemned the whole doctrine of limiting the carrier's liability by a notice; if after a long course of legal controversy they have retraced their steps, and returned to the simplicity and certainty of the common law rule; we surely ought to profit by their experience, and should hesitate long before we sanction a practice which not only leads to doubt and uncertainty concerning the rights and duties of the parties, but which encourages negligence, and opens a wide door to fraud.

If the policy of the law in relation to carriers were more questionable than I think it is, it would be the business of the legislature, and not of the courts, to apply the proper remedy. The plaintiff is entitled to judgment in pursuance of the stipulation contained in the case.

The chief justice concurred.

COWEN, J., concurred in the result for the reasons assigned by him in the case of *Cole v. Goodwin and Story*, *post*.

Judgment for the plaintiff.

The principal case and the case of *Cole v. Goodwin*, *post*, 470, are reported by Redfield among his leading cases on railways, vol. 2, pp. 96, 110, and have been very extensively cited by the courts of New York, and quite largely by the courts of other states. As the two cases are generally cited together, we shall first give the citations of *Hollister v. Nowlen* alone, and then those of both together. It was cited to the following points, in the following cases: That a notice, even when brought home to the knowledge of a shipper, is only a proposal for a special contract which it is incumbent on the carrier to show was agreed to by the shipper: *Belger v. Dinsmore*, 51 Barb. 78; 34 How. Pr. 428; *Sunderland v. Westcott*, 40 Id. 470; 2 Sweeny, 284; *Western*

Trans. Co. v. Newhall, 24 Ill. 470. That money in a trunk for traveling expenses may be included as baggage: *Browning v. Long I. R. R. Co.*, 2 Daly, 121. That the liability of a common carrier does not depend upon the terms of the contract, but is declared by law: *Thurman v. Wells*, 18 Barb. 514; *Merritt v. Earle*, 29 N. Y. 122; *Kirkland v. Dinsmore*, 62 Id. 175. That a common carrier is at common law an insurer except against the act of God or the public enemy: *Merritt v. Earle*, 31 Barb. 44. That the fact that the owner accompanies his goods can not affect the liability of the carrier: *Mallory v. Tioga R. R. Co.*, 39 Id. 492. That a carrier can not limit his liability by publishing notices: *Macklin v. N. J. S. Co.*, 7 Abb. Pr. (N. S.) 238. That an action against a common carrier for loss of goods does not proceed upon an allegation of non-performance of contract, but for a breach of duty, and is not referable: *Warner v. Western Trans. Co.*, 3 Rob. 706. That a plaintiff could not be responsible upon a contract of which he never knew, and to which he never assented: *Kirkland v. Dinsmore*, 4 N. Y. S. C. 308 (T. & C.) That a carrier has a right to demand from his employer a statement of the value of the goods to be carried, in order that he may know what compensation to charge and what care he ought to bestow: *Oppenheim v. N. S. Ex. Co.*, 69 Ill. 67. That carriers of passengers are only liable to passengers for want of such care as is characteristic of cautious persons: *Ingalls v. Bills*, 9 Metc. (Mass.) 13. That if a person contracts for a limited liability, he does not contract as a common carrier, but as a bailee for hire: *Mich. C. R. R. Co. v. Ward*, 2 Mich. 546; *Mich. C. R. R. Co. v. Hale*, 6 Id. 260. That the implication that the shipper intended to rely on his rights is as strong as that he assented to the terms of the carrier's notice: *N. J. S. N. Co. v. Merchants' Bank*, 6 How. (U. S.) 383; *The Pacific*, Deady, 23. That common carriers can not be made answerable for those casualties which elude human sagacity, and against which no prudence is sufficient to guard: *Holbrook v. Utica & S. R. R. Co.*, 16 Barb. 116. The principal case and the case of *Cole v. Goodwin*, are cited together to the points following in the cases given below. That the notice "all baggage at the risk of the owners" was of no legal importance: *Camden etc. Trans. Co. v. Belknap*, 21 Wend. 361. That carriers of passengers with their baggage are liable as common carriers for the loss of the baggage, although no charge is made beyond the regular passenger fare: *Powell v. Myern*, 21 Id. 594; *Merrill v. Grinnell*, 30 N. Y. 615. That it is very questionable whether inn-keepers and common carriers can contract for a restricted liability: *Alexander v. Greene*, 3 Hill, 20. That it is settled law in New York that a carrier can not limit his liability by notice brought home to the owner of goods entrusted to him: *Farmers' & M. Bank v. Champlain Trans. Co.*, 23 Vt. 205. That a notice brought home to the knowledge of a shipper is only a proposal for a special contract, which it is incumbent on the carrier to show was agreed to by the owner: *Dorr v. N. J. S. N. Co.*, 11 N. Y. 490. That carriers can not limit their responsibility either by notice or by special contract: *Alexander v. Greene*, 7 Hill, 563. That money in a trunk, to be used as traveling expenses, may be regarded as baggage: *Grant v. Newton*, 1 E. D. Sm. 99. That a common carrier is bound to take the goods which are brought to him when they are such as he usually carries, and that general notices are not efficient to restrict his liability: *Mercantile Mut. Ins. Co. v. Chase*, Id. 135. That a carrier is bound to deliver trunk of passenger, and the whole duty rests on him: *Gillwooly v. N. Y. & S. S. N. Co.*, 1 Daly, 199. That stage proprietors are liable as common carriers for baggage: *Dorr v. N. J. S. N. Co.*, 4 Sandf. 142; *Smith v. N. Y. Cent. R. R. Co.*, 29 Barb. 136; *Stanton v. Leland*, 4 E. D. Sm. 91. That a com-

mon carrier may limit his liability by express contract: *Nevins v. Bay State S. Co.*, 4 Bosw. 233. That in New York carriers are not permitted by their own act to restrict their liability: *Moore v. Evans*, 14 Barb. 526. That at common law a carrier is an insurer against everything except the act of God or the public enemy: *Chamberlain v. Western Trans. Co.*, 45 Barb. 219. That a carrier can not limit his responsibility by posting up notice: *Perkins v. N. Y. C. R. R. Co.*, 24 N. Y. 201. That imposition practiced by a shipper upon a carrier, in reference to the goods, destroys the former's right of recovery: *Chicago & A. R. R. Co. v. Shea*, 66 Ill. 477. That it is seriously questioned by some courts whether carriers can restrict their liability by general notices: *Brown v. Eastern R. R. Co.*, 11 Cush. 99. That every person may insist on the carrier's carrying subject to the common law liability: *McMillan v. M. S. & N. I. R. R. Co.*, 16 Mich. 111. That a common carrier can not restrict his common law liability even by special contract: *N. J. S. N. Co. v. Merchants' Bank*, 6 How. (U. S.) 382; *Brig May Queen*, Newb. 469. That in order to discharge a carrier from liability it is necessary to show clearly that the person with whom he deals is fully informed of the terms and effect of the notice: *Camden & A. R. R. Co. v. Baldauf*, 16 Pa. St. 78.

COLE v. GOODWIN AND STORY.

[19 WENDELL, 251.]

FOR THE BAGGAGE OF PASSENGERS COACH PROPRIETORS are answerable as common carriers; and they can not avoid their liability by a general notice, brought home to their customers.

STAGE-COACH PROPRIETOR CARRYING A PASSENGER TO A PARTICULAR PLACE, must leave his baggage there without request from the passenger, and is liable for taking it beyond, although the agents of the stage have failed to book or way-bill it, or to put any mark upon it to show where it is to be delivered.

USAGE OF STAGE-COACH PROPRIETORS NOT TO REMOVE BAGGAGE at a town where they did not change coaches, unless requested by the passenger, will not relieve them from liability in not removing a trunk at such place, the passenger not being shown to have any notice of such usage.

COMMON CARRIER OF BAGGAGE IS ANSWERABLE for all loss not occasioned by act of God or public enemies, although the owner accompanies the property.

COMMON CARRIER IS BOUND TO RECEIVE PASSENGERS AND GOODS, if he have room, and transport them for a reasonable compensation.

COMMON CARRIER CAN NOT EXONERATE HIMSELF, by special agreement or otherwise, from the consequences of gross neglect.

SPECIAL AGREEMENT will not protect carrier against the consequences of the malfeasance or misfeasance of himself or his servants.

CARRIERS MAY LIMIT THEIR LIABILITY to a specified sum, unless the goods are entered and paid for according to their value. *Per Cowen, J.*

OWNER OF PROPERTY INTRUSTED TO A CARRIER must act in good faith, and, if he speak at all, give a correct account of all material circumstances within his knowledge, material to the risk taken by the carrier. *Per Cowen, J.*

GENERAL NOTICE LIMITING CARRIER'S RESPONSIBILITY TO A SUM DESIGNATED, unless he shall be advised of the goods being of greater value, and compensated accordingly, is effectual for his protection. *Per Cowen, J.*

COMMON CARRIER IS A PUBLIC SERVANT charged with certain duties and subject to certain responsibilities; and, receiving the reward of a common carrier, he can not by notice to, nor by the express agreement of his customer, absolve himself from liability for the loss of the property intrusted to him, there being no fraud or misrepresentation on the part of the customer. *Per Cowen, J.*

CASE against defendants, who were common carriers by stage-coaches, from Cherry Valley, Otsego county, to Manlius, Onondaga county, and thence west. Plaintiff being a passenger from Cherry Valley to Madison, paid the usual fare for himself and baggage. This baggage consisted of a trunk containing clothing, a few books, and twenty dollars in bank bills. Plaintiff's name and place of destination were entered on the way-bill; but his trunk was not mentioned. About seven o'clock A. M. the coach reached Madison, and was driven to the stage-house. The horses and driver were here changed, but not the coach. Plaintiff left the coach, breakfasted in the stage-house, but made no inquiry concerning his trunk. The stage stopped about an hour. The driver, before starting, inquired whether plaintiff was going on, and was answered by him that he was not. An hour later the plaintiff asked for his baggage of the driver by whom he had been driven to Madison. The latter stated that he did not know plaintiff had any baggage, and asked why plaintiff had not spoken about it. The trunk, eleven months after its loss, was found at Auburn, brought back to Hamilton, opened there, and its contents found safe, except that three dollars only remained of the twenty dollars in bank bills. The other facts sufficiently appear in the opinions of the judges. The jury gave plaintiff a verdict. Defendants moved for a new trial.

J. A. Spencer and P. Gridley, for the motion.

L. C. Saxton and C. P. Kirkland, contra.

BRONSON, J. The opinion delivered by me in the preceding case of *Hollister v. Nowlen* [ante, 455], renders it unnecessary to examine some of the questions made on the trial. That coach proprietors are answerable as common carriers for the baggage of passengers, and that they can not limit their liability by a general notice brought home to the employer, are now settled questions, so far as this court is concerned.

The objection that both of the defendants are not responsible

for the act or default of the driver employed by one of them is answered by the case of *Bostwick v. Champion*, 11 Wend. 571, affirmed in error, 18 Id. 175 [31 Am. Dec. 371]. The declaration alleges that the plaintiff delivered and the defendants received the trunk and contents to be safely and securely carried, etc., for a certain reasonable reward, to wit, the sum of three dollars. The proof was that the fare paid was two dollars for the plaintiff and his baggage. The variance is not very material. It would have been sufficient to state that the defendants were to receive a certain reasonable reward, without specifying any sum: 2 Chit. Pl. 319, 321. Since the case of *Lyon v. Burtis*,¹ 18 Johns. 510, it has been the practice at the circuits to overlook mere formal mistakes of this kind, by which the party can not have been prejudiced, and to allow an amendment after verdict. If the plaintiff deems it important, he may amend the declaration without costs. This is not a case for imposing terms.

The defendants insist that they were only carriers of the trunk to Madison, and were not bound to take it from the coach, or deliver it at that place, without a notice or request from the passenger. In the form in which the objection was taken on the trial it seemed to be thought important that the trunk was not booked, nor entered in the way-bill; and that it was not labeled or directed to any particular person or place. These are not matters of which the defendants can complain. It was for them, and not the plaintiff, to determine whether the trunk should be mentioned in their books, or entered on the way-bill; and whether they would carry the trunk without a label or direction, was also a matter for their consideration when the contract was made. Having assumed the responsibility of carrying the property, it is not for them to object that they did not adopt all proper precautions to guard against accidents. If the plaintiff on request had neglected or refused to comply with any reasonable regulation of the defendants, it would have presented a different question. But nothing was required of him but the usual fare, and that was paid. In considering whether the defendants are answerable for not delivering the trunk at Madison, it is important to notice that no fraud or intentional concealment is imputed to the plaintiff. Nothing of the kind was pretended on the trial. The plaintiff was a youth, then probably leaving his parents for the first time to enter a public school. Wanting experience as a traveler, and having his thoughts engrossed with other subjects, he forgot his baggage

1. *Lyon v. Burtis*.

until the coach had departed. This was the whole extent of his error. If the cause turned on the want of diligence, there would perhaps be some difficulty in saying which party ought to bear the loss; though my opinion would in that view of the case be against the defendants. They certainly were not without fault. They might have mentioned the trunk as well as the passenger on the way-bill, and thus have advised their coachmen and agents that the plaintiff had baggage to be removed at Madison. As this precaution was omitted, it was the duty of the driver, if he did not know how the fact was, to inquire of a passenger leaving the coach whether he had baggage to be removed. But there was a further and most culpable neglect of duty in not pursuing after the coach when the plaintiff missed his baggage. The coach had been gone but a short time, and at the rate it was traveling might easily have been overtaken. The plaintiff was among strangers, and had no means of pursuing. He applied to Wilbur, the coachman, who had driven to Madison, to go after the stage, and was answered that he had no horse. The answer was false, for the horses had been exchanged at that place. Goodwin, the defendants' agent, was absent. The plaintiff applied to his son, but he declined doing anything. He also applied to the keeper of the stage-house, but with no better success. The defendants select their own servants and are answerable for their defaults. The coachman was chargeable with gross negligence for not pursuing and recovering the property. He probably thought more of the saving clause in the advertisement, "all baggage at the risk of the owner," than he did of the suffering traveler.

The defendants set up a usage in managing their line of stages, to discharge themselves from liability for the loss of the trunk. The usage proved amounts to this: At Richfield and Bridgewater, where the coaches are changed, the baggage is removed, as a matter of course; but at Madison, where the coaches are not changed, they only remove baggage at the request of the passenger. How is the traveler to learn this practice of the defendants, which is different at the two ends of a single stage, except by that kind of experience which the plaintiff has acquired? There is no evidence that he knew anything about this practice. And besides, the usage only proves that the defendants have been habitually careless in managing their business. It does not go far enough. They should have established a usage to be exempt from the legal consequences of their negligence.

But in the absence of all fraud on the part of the plaintiff, this cause does not turn on the question of diligence. The defendants were common carriers as to the baggage; and as such were answerable for any loss of the property which was not occasioned by the act of God or the public enemies. It is wholly unimportant to inquire whether there was any actual default on their part. It is enough that the property was lost, and that the loss did not happen in either of the two ways which, according to the law of the land, will exempt the carrier from liability. We can not add a third ground of exemption, and say that when the owner accompanies the property, the carrier shall be discharged. If the defendants were common carriers as to the baggage, there is an end of the question. Whether the trunk was stolen before it reached Madison, or lost to the plaintiff in consequence of being carried beyond that place, are matters of no moment. The effect of the owners accompanying the property, or sending a servant to look after it, is noticed in the case of *Holister v. Nowlen*, ante, 455. There is no principle upon which it can affect the liability of the carrier as to property committed to his charge, unless there was some fraud on the part of the owner. The defendants' counsel have only been able to refer to a single case as containing a qualification of the rule, and that will be found not to answer their purpose: *East India Co. v. Pullen*, 1 Stra. 690. The defendant was a common lighterman, and the action was on an undertaking to carry on the Thames from the ship to the plaintiff's warehouse. The company put an officer in the lighter, who, as soon as the lading was completed, put the company's lock on the hatches, and went with the goods to see them safely delivered at the warehouse. A part of the goods were lost. Raymond, C. J., said: "This differed from the common case, this not being any trust in the defendant, and the goods were not to be considered as ever having been in his possession, but in the possession of the company's servant, who had hired the lighter to use himself." This case, instead of impugning, goes to confirm the rule already mentioned. In the case at bar, the plaintiff had no charge of the property. It was committed to the trust of the defendants. They received it into their possession, and disposed of it as they thought proper, without any instructions or interference on the part of the plaintiff; and by the law of the land, they are answerable for the loss.

COWEN, J. The defense in this case certainly sets up a very easy way of dealing with stage-coach passengers. It can not

be denied that the defendants are, *prima facie*, as much common carriers in respect to the baggage of passengers, as anything else which they convey for hire. As such they are, according to all the books, insurers against losses except such as arise from the act of God, or the public enemy. The accident in question can in no sense be called either. It was less than inevitable accident, for all risk was avoidable by a moderate degree of attention, the most obvious of which was an entry on the way-bill according to some mark or other designation, and noting the place of destination, where by law the carrier is bound to make delivery: *Gibson v. Culver*, 17 Wend. 305 [31 Am. Dec. 297], and the cases there cited. This obligation is sought to be qualified by the usage of the defendants' line, to which the plaintiff is a total stranger. Indeed, in the absence of knowledge of the usage, he is told that the charge of the baggage belonged to himself; and that by silently departing from the stage at Madison, with apparent unconcern, he improperly lulled the driver into a state of carelessness. It is an answer, that all this was avoidable by a little seasonable caution; and I have yet to learn that when a common carrier is called to account for losses, the passenger is to be answered by his own want of care. It is placing the obligation upon the wrong man. The passenger has surrendered the custody of his baggage to the coach owners, whose obligation is absolute; and the law will not endure that they should answer either by the utmost care in themselves, or the want of it in another. I speak independent of all usage; for none is brought to the knowledge of the plaintiff. The carrier must take measures at his peril to learn and abide by the place of delivery, either as fixed by law, or at the utmost by the established and notorious usage of the line, such usage being known to the passenger: *Gibson v. Culver*, before cited. It was so held in *Forward v. Pittard*, 1 T. R. 27, where a fire not occasioned by lightning, but burning with inextinguishable rage, communicated with and consumed the article. The accident was there said to be inevitable; but the court held it must be more; and Lord Mansfield instanced the destruction of property by the riot of 1780, as no excuse. It is true the owner was not, in that case, with the goods; but his presence would have made the defendant no less a common carrier, as was conceded by the present chief justice, in *Orange Bank v. Brown*, 9 Wend. 117 [24 Am. Dec. 129].

We are reminded of the custom for the owner to attend and point out his baggage to the carrier, at the place of his departure

from a steamboat, car, or coach. If the carrier will depend on the care of the owner (and I admit there is often a necessity for it under every responsibility) he certainly may do so; but it is a solecism to say he is a common carrier while we deny the very duty which is essential to that character. A mere chalk-mark and the dash of a pen upon the way-bill would in most cases avoid all risk; and it would be strange indeed that the omission of an easy precaution should be deemed by the law equivalent to the act of God. It is really too much like gross negligence. The owner many times can not reach the baggage-room on account of the crowd, and if you demand that he should mention or call for it, you require an exertion of body or lungs, to which few would be equal under all emergencies. Besides he may not know whom to address. Are you bound to mark the direction yourself? The carrier knows the stopping-place, which is perhaps resolved on at the moment, and he holds the way-bill. If the article be not properly directed and entered, let him wait till both be done, or refuse for that reason to undertake what he can not perform, if there be not time to affix the proper marks. He knows what marks and entries will accord with his system of business, and be intelligible to his agents on the line. All this care belongs in good reason, where the law has placed it, with the carrier himself. The question is one of simple custody, for care follows custody. This has been held of an inn-keeper, whose obligation is much like that of a carrier, and stands upon the same reason: 2 Kent Com. 591, 3d. ed. He is liable for all the goods which his guest brings with him to the inn, even though he hold the key of his chamber where the goods are: Story on Bail. 313, sec. 479; 2 Kent Com. 593, 594, 3d. ed. But if he take the exclusive custody of the goods, or positively interfere with them so as to put them in peril, or deliver them to a third person for custody, the inn-keeper is exonerated: Story on Bail. 315, sec. 483; 2 Kent Com. 595, 3d. ed. "It appears to me," said Bailey, J., in *Richmond v. Smith*, 8 Barn. & Cress. 9, "that an inn-keeper's liability very closely resembles that of a carrier. He is *prima facie* liable for any loss not occasioned by the act of God or the king's enemies, although he may be exonerated where the guest chooses to have his goods under his own care." The analogy was in some measure extended to the carrier by the case of *Miles v. Cattle*, 6 Bing. 743. The plaintiff, a passenger, had with him his own bag of clothes in the coach, into which bag he slipped a fifty-pound bank-note belonging to another, who had directed it to be booked at the carrier's office.

It could not have been booked without a reward. The plaintiff thus had it in his exclusive custody, and therefore it was held that he should not recover. In another respect the case was like that before us. At York, his place of destination, he got out of the coach and walked away and was gone two hours; yet the point was not even made, that he should for that reason fail to recover for his bag and clothes, which had been purloined with the note during his absence. And this, though the case was stronger for a point of gross neglect than the present; for he retained the actual though not the exclusive custody of his bag. In the case before us the regular fare was paid for the plaintiff and his baggage; and the trunk probably placed in the usual separate department. But the more effectually to secure impunity for absolute carelessness, the defendants gave notice, that all baggage was at the risk of the owner. This, taken literally, is another mode of fastening all the duty on the passenger, exactly inverting the obligation imposed by law. It is saying, "I like your passage money, and the emoluments of my public employment as a common carrier of passengers and their baggage. I will take my reward, but choose to consult my convenience and safety in the measure of responsibility." If the carrier have the legal power to restrict any branch of his liability, either by special contract or notice, it is certainly important to inquire, looking at the consequences, whether such power be arbitrary and illimitable. If it be, there is no end to this kind encroachment; and the passenger may as well be required to risk his limbs or his neck.

All must agree with what was said on the argument, that a man may become a common carrier or not at his option, and that he may limit his office to the carrying of persons or goods as he pleases, and at such general prices as he may choose to charge. 2 Kent Com. 598, 3d. ed. But his office as a common carrier once becoming fixed, and his line of travel, subjects of carriage, and prices established, it is much more questionable whether, in respect to passengers or goods which are fairly committed to him, he can qualify his public duty. It is agreed by all the books, that while he enjoys the privileges of a common carrier, there are certain duties pertaining to that office which he can not escape in any form. In the first place, he is bound to receive passengers and goods, if he have room, and carry them for a reasonable reward, which may be set down as the accustomed reward for like services: 2 Kent Com. 598, 3d ed., and cases there cited in note f; *per* Mansfield, C. J., and Lawrence, J., in *Harris v. Pack-*

wood, 3 Taunt. 271, 272; *per Best*, C. J., in *Riley v. Horne*, 5 Bing. 217; S. C., 2 Moo. & P. 331, 338. It is equally well settled that he can not, either capriciously in a single instance, or by public notice, seen and read by his customer, or even by special agreement, exonerate himself from the consequences of gross neglect: *per Best*, C. J., in *Riley v. Horne*, 5 Bing. 217; S. C., 2 Moo. & P. 331, 341; *Sleat v. Fagg*, 5 Barn. & Ald. 342; *Wright v. Snell*, Id. 350; *Birkett v. Willan*, 2 Id. 356; *Beck v. Evans*, 3 Camp. 267; S. C., 16 East, 244; *Bodenham v. Bennett*, 4 Price, 31; *Smith v. Horne*, 8 Taunt. 144; S. C., 2 Moo. 18; *Newborn v. Just*, 2 Car. & P. 76.

It is said in the Doctor and Student, Dial. 2, c. 38, p. 224, of Machall's ed., "If he [the carrier] would per case refuse to carry it unless promise were made unto him that he shall not be charged for no misdemeanor that should be in him, the promise were void, for it were against reason and against good manners, and so it is in all other cases like." In Noy's Maxims, 92, it is said: "If a carrier would refuse to carry unless a promise were made to him that he shall not be charged with any such miscarriage, that promise is void." Gross negligence is in general a species of fraud, though it may not be always so: Story on Bail. 13, secs. 19-22. And an agreement giving direct countenance to a fraud would be contrary to public policy. It is equally well settled that a special agreement, or, which is the same thing, a notice seen and acted upon by the owner of goods, will not protect the carrier against the consequences of the malfeasance or misfeasance of himself or his servants, as if they convert the goods or make a wrong delivery: Story on Bail. 365, sec. 570, and the cases there cited: *Beck v. Evans*, 16 East, 244. Indeed all this would be so, could we suppose the carrier's obligation brought down to that of a mere mandatary. Passing below gross neglect and misfeasance, the balance of opinion in Westminster hall would seem to be that the liability of the carrier may be dispensed with: Story on Bail. 365, sec. 571, and cases there cited. I think *Lowe v. Booth*, 13 Price, 329, may be set down as a direct adjudication that ordinary neglect may be provided against by the parties.

But the great question is, under what limitations may the parties provide for a reduction of the liability. For one, I hardly feel warranted to interpose a general denial that the extraordinary responsibility of the common carrier may be taken away by the joint act of the parties; and such I take a proper notice to be if known to the bailor. I agree that there is no adjudication of

a date so ancient, that we are obliged to respect it as authority, giving the common carrier a right to take a fair reward for the carriage, and yet acquit himself of his obligation as such. Admitting the doctrine of notice to have that effect, and to be as old as *Forward v. Pittard*, 1 T. R. 27, as was said by Burrough, J., in *Smith v. Horne*, 8 Taunt. 144, 146; S. C., 2 Moo. 18, 22, yet we are carried back no farther than 1785, about ten years after the revolution. And even so soon after, we find the learned judge adding: "It can not but be lamented that such notices have ever been used and recognized as a protection to carriers, to divest them of their responsibility:" Id. 22. If he meant a general and arbitrary power of protection, I think every one must concur with him; but if he is to be understood as speaking to the extent of the case before him, it appears to me that the notice was very properly allowed to avail both upon principle and authority. It was thus: "That they (the carriers) would not hold themselves accountable for cash, writings, or any article above the value of five pounds, unless entered and paid for according to its value, when delivered to their agents:" Id. 19; more briefly 8 Taunt. 144, 145. I am inclined to think, by what fell from Park, J., in the same cause, that both he and Burrough, J., must have alluded to the disposition of carriers to extend their protection by notices beyond the principle on which they were originally allowed. Park, J., said: "The indulgence given to carriers by limiting their responsibility by the notices usually affixed in their offices, has occasioned great public inconvenience. The courts have lately been inclined to restrain them:" 2 Moo. 21, 22. And they determined that even this, the usual and allowed notice, should not protect the defendants against gross negligence.

To appreciate in a proper manner the particular notice in question, it is necessary to advert briefly to the relative obligation of the carrier and owner. The former is an insurer against loss by any event except the act of God (now holden to be synonymous with inevitable accident), or the enemies of the republic: *Per Holt, J.*, in *Coggs v. Bernard*, 2 Ld. Raym. 918; *Forward v. Pittard*, 1 T. R. 27, 33. To this may be added another exception: a loss by the fraud, and perhaps the gross neglect of the owner in a case where he owes a duty: *Bradley v. Waterhouse*, 3 Car. & P. 318; *Whalley v. Wray*, 3 Esp. N. P. Cas. 74. It follows, that the obligation of the owner is like that of other persons who cause their property to be insured. He must act in good faith, and, at least, if he speak at all, give a correct account of every circumstance peculiarly within his own knowl-

edge, which is material to the risk which the insurer incurs according to the legal nature of his engagement. The case of *Kenrig v. Eggleston*, Aleyn, 93, was very severe upon the carrier. The plaintiff delivered a box to the carrier's porter, telling him there was a book and tobacco in it; in truth it contained one hundred pounds besides. The whole was lost, and the carrier held liable for the money. "It was agreed by the counsel, and given in charge to the jury, that if a box with money in it be delivered to a carrier, he is bound to answer for it if he be robbed, although it was not told him what was in it. And so it was ruled in one *Barcroft's* case, as Rolle said, where a box of jewels was delivered to a ferry-man, who, knowing not what was in it, and being in a tempest, threw it overboard into the sea; and resolved that he should answer for it." Rolle finally directed, "that although the plaintiffs did tell him of some things in the box only, and not of the money, yet he must answer for it; for he need not tell the carrier all the particulars in the box. But it must come on the carrier's part to make special acceptance." He left the question of the intended cheat to the jury to consider in damages; and they found the whole one hundred pounds, deducting three pounds for carriage. It is indeed not surprising, as added by the reporter, "*quod durum videbatur circumstantibus*." The general principle laid down in this case as derived from *Barcroft's*, so far from having been ever questioned, has been repeatedly affirmed, though it has been thought to have been there wrongly applied, inasmuch as there was evident artifice made use of to disguise the fact of there being money in the box. This case was decided in 24 Car. I. See *per* Best, C. J., in *Riley v. Horne*, before cited. There is a still stronger case against the carrier cited by Hale in *Morse v. Slue*, 1 Vent. 238.

In the case of *Tyly v. Morrice*, 11 Wm. III., Carth. 485, the plaintiff's servant delivered to the defendant's book-keeper, four hundred and fifty pounds in two sealed bags, and told him it was two hundred pounds, which the book-keeper receipted in writing as "two bags of money sealed up, said to contain two hundred pounds." The whole being lost by a robbery, the carrier paid two hundred pounds, and the plaintiff sued for the balance on the authority of *Kenrig v. Eggleston*. The court distinguished the case, and confined the plaintiff's claim to what had been paid, because there was a particular undertaking by the carrier for the carriage of two hundred pounds only, and his reward was to extend no further than to that sum, and 'tis the reward which makes the carrier answerable; and since the

plaintiffs had taken this course to defraud the carrier of his reward, they had thereby barred themselves of that remedy which is founded on the reward." The case of *Fitchburne v. White*,¹ 5 Geo. I., Feb. 16, 1718, is thus reported in 1 Stra. 145: "Per King, C. J. If a box is delivered generally to a carrier, and he accepts it, he is answerable, though the party did not tell him there is money in it. But if the carrier asks and the other says no, or if he accepts it conditionally, provided there is no money in it, in either of these cases, I hold the carrier is not liable; Aleyn, 93, is cited as authority. The case of *Gibbon v. Paynton*, 4 Burr. 2298, approves of the general doctrine in *Kenrig v. Eggleston*, but thinks it misapplied. I have noticed these cases, and some of them at large, as showing, 1, that the carrier is liable in respect to his reward; but 2, that to raise in the law a respect to his reward, he must make a special acceptance, or at least inquire and obtain a positive representation. It follows that if the plaintiff either answer untruly, or on request refuse to make any reply whatever, the carrier may say either that he will not receive the goods, or that if he receives them, it shall not be as a common carrier; indeed, that he will not consider himself accountable as a bailee for reward. He may either refuse to receive pay for the carriage, or refuse to receive a premium beyond a certain amount. I forbear to go farther into the cases, because I think these general propositions are all substantially adjudged by this court in the late case of the *Orange Co. Bank v. Brown*, 9 Wend. 85, 114, 115 [24 Am. Dec. 129].

Then reading the cases on this subject, and especially those of *Kenrig v. Eggleston*, and *Morse v. Slue*, will any one say that the carrier shall be liable, where the owner refuses to concur in any reasonable request on his side to avoid imposition; to make everything honest and fair? Was it unreasonable then in the carriers, to demand, as in *Smith v. Horne*, that all over five pounds should, in order to fix the carrier with loss, be entered and paid for according to its value? What is this but demanding what no one can deny, that the laborer shall be paid according to his hire? Is it unreasonable to make a condition that the owner shall be honest? How far it is so, let us see from another case: *Gibbon v. Paynton*, 4 Burr. 2290. The defendants had properly advertised, that their coachman would not be answerable for money or jewels or other valuable goods, unless he had notice that such were delivered to him; and it was probable that the plaintiff knew of the notice, and understood, that by the

1. *Fitchburne v. White*.

course of trade, money was not carried without an extra premium. Yet the plaintiff delivered to the coachman one hundred pounds hid in hay in an old nail-bag. The bag and the hay were carried safely; but the money was lost. It was held that the plaintiff could not recover. This case is remarkable as being among the earliest cases, if not the very first case in which the carrier's notice appears. It was in Easter term, 9 Geo. III., A. D. 1769. Lord Mansfield proceeded entirely independent of the notice; he considered the plaintiff's conduct fraudulent, though he does not deny that mere silence as to the amount, may in general be honest, if the plaintiff be not called out by the carrier. Yates, J., considered the notice equivalent to a special acceptance. He said, "this was a special acceptance." Aston, J., also hinted at the same ground; and both he and Lord Mansfield laid great emphasis on the principle, that a carrier is liable in respect to his reward.

It is obvious that if the owners are open to frauds when once the goods are committed to the hands of the carrier, the latter is equally exposed to imposition in the delivery; and while it is reasonable that he should demand notice of what he is called upon to transport, is it not equally reasonable that he should make other regulations as to booking the goods? Best, C. J., in *Riley v. Horne*, after mentioning as an excuse for using a printed notice, that "It would be inconvenient, perhaps impossible, to have a formal contract made for the carriage of every parcel, in which the value of the parcel should be specified, as well as the price to be paid for the carriage," proceeds: "But it would add very little to the labor of the book-keeper, if he entered the value of each package, and gave the person who brought it a written memorandum of such entry, like the slips now made on an agreement for a policy of insurance." I have yet to learn that anything calculated to insure an exercise of good faith on either side, or a full understanding of the contract, or to furnish the proper evidence of the contract, may not be demanded. I will add, that all this is due to the safety of the carrier, whose means of providing even for his general security, as well as for that of the particular package, may be materially affected by temptations to robbery concealed from him in trunks, boxes, or old bags of hay, but perhaps known to others through the treachery of the owner's servants, and in flagrant cases, of the owner himself. I have already noticed in another connection, the importance of an entry to be transferred to the way-

bill, as a guide for the carrier's agent at the point of destination and delivery.

Laboring under the difficulty of making inquiries or drawing up special acceptances in each case, and knowing that a silent acceptance on their part would open them to interminable frauds, carriers resorted to the notice as a proper substitute. If such as a carrier has a right to give, it is in its own nature and according to all the analogies of business, when brought home to the owner—and this must always be proved—a proposition, which, if followed by a delivery of the parcel, fastens upon the transaction the conditions or other terms specified. *Bignold v. Waterhouse*, 1 Mau. & Sel. 255, is very strongly illustrative of this position. The defendants had given the usual notice, that value above five pounds must be entered and paid for. That not being done, Lord Ellenborough, C. J., said: "There was no contract at all between the plaintiffs and defendants; in which case *non oritur actio*." In *Batson v. Donovan*, 4 Barn. & Ald. 21, Best, J., and the whole court agreed that though the carrier must make the proper inquiries, yet "the effect of the notice is to prevent the necessity of a particular inquiry in each case." *Harris v. Packwood*, 3 Taunt. 264, is also, that unless the notice be complied with, there is no contract at all, and in case of loss, the plaintiff can not recover even the lesser sum specified.

So long as the printed notice of a common carrier is confined to the purposes which I have enumerated, and others calculated to save himself without mischief to his customer, or for the benefit of the latter, I see no objection in principle to giving it full effect. So far it is not a refusal to carry for a reasonable reward. So far it is not a limitation of the carrier's liability. He merely declares to the customer what is true and just: "You know the value of your goods; I will not rummage your parcel; I will take your own account; but I will not incur the responsibility of a common carrier unless your account shall prove true. If you commit a fraud or deal captiously or capriciously on your own part, you can not complain if my duty is reduced to that of a mandatary."

I have taken pains to look at the English cases concerning carriers' notices, with a view to the principles mentioned; and considering the loud and repeated complaints which have been made against them as a pernicious innovation, I have been disappointed to find them, with very few exceptions, confined within those principles, and well sustained both by authority and the analogy of the law of insurance. To deny that nearly all of them, I do

not say quite all, so far as they give general effect to such notices, are not to enter into and form a part of our own law, would, it appears to me, be to rise against the united authority of Westminster Hall, both before and since the revolution. I do not speak of the various qualifications under which they have been received, arising from some difference of language in the notices themselves, diversity of circumstances to which they have been applied, or the conflict of judicial authority. These may justly form the subject of complaint. But to make a difficulty in understanding and applying the language of commercial instruments an objection to the instruments themselves, would long since have stricken many such from existence.

Most of the litigation upon this subject has arisen from notices said to have been got up with a view to protect carriers by land in wheel carriages or sleighs. The cases are very numerous, and I can not pretend to cite them all; but will simply refer to such as I have found on considerable search, in order that it may be seen, whenever thought worth while, how nearly they all come in principle and mostly even in words and letters, to the examples already exhibited from *Smith v. Horne* and *Gibbon v. Paynton*: *Vide, Yate v. Willan*, 2 East, 128; *Izett v. Mountain*, 4 Id. 371; *Clarke v. Gray*, 6 Id. 564; 2 Smith, 262,¹ and S. C., 4 Esp. 177; *Nicholson v. Willan*, 5 East, 507; S. C., 2 Smith, 107; *Batson v. Donovan*, 4 Barn. & Ald. 21; *Thorogood v. Marsh*, 1 N. Gow, 105; *Covington v. Willan*, Id. 115; *Bignold v. Waterhouse*, 1 Mau. & Sel. 255; *Riley v. Horne*, 5 Bing. 217; *Newborn v. Just*, 2 Car. & P. 76; *Brooke v. Pickwick*, 4 Bing. 218; *Garnett v. Willan*, 5 Barn. & Ald. 53; *Sleat v. Fagg*, Id. 342; *Bradley v. Waterhouse*, 3 Car. & P. 318; *Macklin v. Waterhouse*, 2 Moo. & P. 319, and *Riley v. Horne*, Id. 331, both these cases reported in 5 Bing. 217, under the title of *Riley v. Horne*; *Roskell v. Waterhouse*, 2 Stark. 461; *Hutton v. Bolton*, 3 Doug. 59; S. C., 1 H. Bl. 299, note; *Kerr v. Willan*, 6 Mau. & Sel. 150; S. C., 2 Stark. 53; *Davis v. Willan*, Id. 279; *Alfred v. Horne*, 3 Id. 136; *Clayton v. Hunt*, 3 Camp. 27; *Buller v. Heane*, 2 Id. 415; *Rowley v. Horne*, 10 Moo. 247; S. C., 3 Bing. 2; *Beck v. Evans*, 16 East, 243; S. C., 3 Camp. 267; *Wilson v. Freeman*, 3 Id. 527; *Levi v. Waterhouse*, 1 Price, 280; *Lowe v. Booth*, 13 Id. 329; *Down v. Fromont*, 4 Camp. 40; *Munn v. Baker*, 2 Stark. 255; *Gouger v. Jolly*, 1 Holt, N. P. 317; *Cobden v. Bolton*, 2 Camp. 108; *Marsh v. Horne*, 5 Barn. & Cress. 322; *Bodenham v. Bennett*, 4 Price, 31; *Mayhew v. Eames*, 3 Barn. & Cress. 601; *Clay v. Willan*, 1 H. Bl.

298. If instead of looking at the original cases, any one be desirous of seeing their general character at a shorter glance, he will find many of them abstracted in Wheat. Sel. N. P., Carriers 2; and still more copiously in 5 Petersd. Abr., Carriers by Land, 64-86, Am. ed., with Ham. Suppl. Carriers, Notices, effect of, 227-236.

These notices have, in some of their aspects, been occasionally vindicated, *per* Lawrence, J., in *Harris v. Packwood*, 3 Taunt. 264, and Best, C. J., in *Riley v. Horne*. In the first case, Mansfield, C. J., complained of them as leading to frauds, by disclosures of value to persons standing around; but he adds, however inconvenient that may be, "it seems that from the days of Aleyn down to this hour, the cases have again and again decided that the liability of a carrier may be so restrained." Lord Ellenborough, in *Down v. Fromont*, 4 Camp. 40, expressed his sorrow that carriers had been allowed to limit their common law responsibility at all, and said that some legislative measure upon the subject would soon become necessary. Several statutes had then already been passed in England, fixing limits to the responsibility of carriers by water; and in 1830, the stat. 1 Wm. IV., c. 68, restrained the effect of the notice by land carriers; but adopted the great principle of the notice by requiring the owner to state the value of certain enumerated articles to the carrier at the time of delivery. A short abstract of these statutes is given in 2 Kent Com. 605, and the note there. The statute of 1830 is stated more at large in *Id.* 607, note c. And it is handsomely abridged, section by section, with all its provisions, in Smith's Mercantile Law, 170, 171.

Some few American books may be said to amount to a general recognition of the validity of the carrier's notice, without, however, fixing any boundary to its object or operation: *Orange County Bank v. Brown*, 9 Wend. 115 [24 Am. Dec. 129] *per* Nelson, J.; *Phillips v. Earle*, 8 Pick. 182; *Bean v. Green*, 3 Fairf. 422. So much both for judicial and legislative action, the great mass of which has been directed to enforce a fair course of conduct on the side of the bailor. They all go upon the most obvious ground: That a man shall not raise an action in his favor out of his own fraud or neglect.

Chief Justice Best, 2 Moo. & P. 341, 342, thus sums up the points which are material to the case before us:¹ "That a carrier is an insurer of the goods that he carries; that he is obliged for a reasonable reward to carry any goods that are offered him, to the

1. *Riley v. Horne*.

place to which he professes to carry goods, if his carriage will hold them and he is informed of their quality and value; that he is not obliged to take a package, the owner of which will not inform him what are its contents and of what value they are; that if he do not ask for this information, or if, when he asks and is not answered, he still takes the goods, he is answerable for their amount whatever that may be; that he may limit his responsibility as an insurer by notice." It is the extent of this right of notice or of special acceptance which is the important object of attention.

Suppose all the reasonable terms of the carrier complied with: the value disclosed, or the goods weighed where that is required as it may be: *per* Nelson, J., in *Orange County Bank v. Brown*, 9 Wend. 114 [24 Am. Dec. 129]; *Munn v. Baker*, 2 Stark. 255; the premium paid or secured without inquiry, or according to value or weight, the goods booked and placed in the coach beyond the reach or the knowledge of the owner; having come hundreds of miles perhaps of his journey, relying on coach owners who take all the benefits and privileges of common carriers, he meets on going into an office, for the first time, with the unqualified notice, "All baggage at the risk of the passenger." Suppose a case of no notice, but simple refusal to take on common law terms; no one will pretend that the carrier could enforce such a claim. Is the notice anything more? It comes to the bailor's knowledge for the first time in his life. He is surprised with a declaration that all his reliance for the safety of his baggage is gone, unless he shall, in case of its loss, have the luck to prove by the servants of the coach owner, the instruments of misfeasance or neglect, that one or the other has intervened. What is the reason that the common law will not excuse the carrier unless he show the act of God, or the enemies of the republic, or the misconduct of the plaintiff? This, says Lord Holt, "is a politic establishment, contrived by the policy of the law for the safety of all persons the necessity of whose affairs requires them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered." *Coggs v. Bernard*, 2 Ld. Raym. 918. Nor was this said of a barbarous people or a barbarous age; but in the reign of Queen Anne, of morals, arts, and arms, an age distinguished as the Augustan era of England. As late as 1828, in *Riley v.*

Horne, Best, C. J., said: "If the goods should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss: his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves." 2 Moo. & P. 337. It would be arrogant in any nation to claim a state of morals superior to those of England, and especially to Scotland, where the same rigor prevails; still more arrogant, not to say profane, to claim a national perfectability so high as to rise above temptation. Chancellor Kent admires the steady and firm support which the English courts have given to the salutary rule of law on this subject, without bending to popular sympathies, or yielding to the hardships of a particular case: 2 Kent Com. 601, 602, 3d. ed.

Can the carrier in any way put an absolute limit in his own discretion on his own duty and responsibility, thus based upon foundations of public policy? In the first place, how stand the books? In *Kirkman v. Shawcross*, 6 T. R. 14, it was held that dyers and bleachers might, by resolution and notice to their customers, enlarge their respective liens on goods bailed to them, so as to cover a general balance. But Lord Kenyon, C. J., differed the case from that of common carriers, who had no power to impose such terms. His words are, "They have no right to say they will not receive any goods but on their own terms;" though he recognized their right to the notice protective against the fraud of the bailor. So he said of innkeepers, "who are bound to protect the property of their guests." Ashurst, J., speaks of the obligation of innkeepers as indelible. The same distinction was recognized by Alvanley, C. J., in *Oppenheim v. Russell*, 3 Bos. & Pul. 42, 47. He was followed by Rook, J., in the same case. Chambre, J., added that such a notice by a carrier would be "so manifestly unreasonable and monstrous, that I think no legal agreement can be implied from such a notice." In *Lane v. Cotton*, 1 Salk. 18, Holt, C. J., places the occupation of a carrier on the list of public employments, and adds that his undertaking is in proportion to his power and convenience. In the report of the same case, in 12 Mod., he thus groups the reasons for the duty of the carrier and the innkeeper: "For what is the reason that a carrier or innkeeper is bound to keep such goods as he receives, at his peril. It is grounded upon great equity and justice; for if they were not chargeable for loss of goods without assigning any

particular default in them, they having such opportunity as they have by the trust reposed in them, to cheat all people, they would be so apt to play the rogue and cheat people, without almost a possibility of redress, by reason of the difficulty of proving a default particularly in them, that the inconveniency would be very great. And though one may think it a hard case that a poor carrier who is robbed on the road without any manner of default in him, should be answerable for all the goods he takes, yet the inconveniency would be far more intolerable if it were not so; for it would be in his power to combine with robbers, or to pretend a robbery or some other accident without a possibility of remedy to the party; and the laws will not expose him to so great a temptation; but he must be honest at his peril." Taking the arguments of Holt and Best, a relaxation of the common law rigor opens the high-road to fraud, perjury, larceny, and robbery. "Common carriers must not understand," says Lawrence, J., in *Nicholson v. Willan*, 2 Smith, 113, "that they can impose any terms which they please upon persons who send goods." Where is the boundary? The defendant in the case before us, says the carrier himself is to prescribe it. If this be so, it is easy to see that the common law is overcome, for it never was thought that if this question were entrusted to the party instead of the law, the fences against damage and loss would stand for a moment. The case in hand is not an effort to secure a fair premium for carrying baggage. That premium is demanded and received in the name of passengers' fare. To say the contrary, is against common sense, and a shallow evasion; nor is it indeed pretended. You can not raise a distinction in this way between a passenger and his traveling-trunk, which is to contain his clothes and money for traveling expenses, and his books if he be on his way to college, as in this case.

I will now proceed to consider such few *dicta* and adjudications as I have been able to find, in virtue of which I admit if they are to prevail, the common carrier will himself hereafter give the law; and the result will be that in the course of a short time no single person, properly sustaining that character, will be left in the state. To this effect it is said we have the opinion expressed on the occasion of a bill sent up from the house of commons some time after the decision in *Smith v. Shepherd*, in 1795, Ab. Sh., p. 3, c. 4, sec. 1. In *Lyon v. Melts*, 1 Smith, 484, Lord Ellenborough, C. J., gives this account of the matter: "If the carrier is at liberty to refuse absolutely to carry money, he

may also refuse to carry anything else ; but he is bound to take for a reasonable reward. There must be, therefore, some limitation. A bill was brought into parliament to alter the law with respect to ship-owners; but it was thrown out by the law lords, that the parties might relieve themselves against the liability to the full extent, by a special notice and agreement. This caused an alteration in the bills of lading, and also several public notices, which are mentioned in several cases in this court." *Morse v. Slue*, 1 Vent. 190, 238, a previous case in Car. II., was deemed a very hard one on ship-owners. The ship was robbed by a very strong force. The defendant, though acquitted by the jury of all fault, was yet held liable. The ship being in *corpus comitatus*, as Hale said, on the cause being a second time taken up by the court, was subject to the law of common carriers; secondly, said he, " If the master would, he might have made a caution for himself, which he omitting and taking in the goods generally, he shall answer for what happens." The case of *Lyon v. Mells*, 1 Smith, 478, was itself of a most extraordinary character for the extent of exemption claimed under the notice; and though the court was enabled to avoid deciding upon its general effect, it is worthy of remark, as showing to what lengths carriers immediately attempted to proceed under the favorable suggestion of the law lords. The notice was that the defendant would not be responsible for any loss or damage to any cargo unless it happened by want of ordinary care and diligence in the master and crew, and even then only to ten per cent., this not to exceed the value of the vessel, etc., and if any person was desirous to subject the defendant for losses by the act of God or otherwise, he must make a special agreement and pay extra freight. The notice was signed by forty-nine owners of vessels at Hull, and published in due form. As the neglect proved was finally thought to be that of the owner himself, the case was held not to come within the notice, and the court did not think it necessary to say definitely whether it would protect against the negligence of the master and crew. The owner furnished a leaky vessel. And as to the ten per cent. clause, that could be applied in reason only to losses which might happen by accident: S. C., 5 East, 428. At the close of the argument, as stated by Smith's report, in which the utter illegality of the notice had been insisted on as contrary to the policy of the law, Lord Ellenborough, C. J., said that if it should be necessary to decide the case upon general principles it was of great importance. This was said in 1804, and from it I clearly collect that

the power of carriers to qualify their duty to the owners of goods fairly committed to them, was still open. This conspiracy among the ship-owners at Hull, to subvert the common law in respect to their own community, makes its first appearance to us in *Ellis v. Turner*, 8 T. R. 531, A. D. 1800. And in that case I think the notice was at least shorn of its power to protect the owner against the misconduct of the master, by which the loss happened. Yet even this notice came short of some others which were, as we shall see, subsequently allowed; for it left the owner a privilege to get an insurance under a special contract.

The contest in respect to such sweeping qualifications seems to have been less frequent since the resistance they met in *Lyon v. Mells*, though Lord Tentarden, late Abbott, C. J., in his treatise on shipping, pt. 3, c. 4, sec. 8, p. 296, Story's ed. 1822, has left on record an instance, in which he thinks that by the usual exception in the bill of lading, the master may stand protected against a loss by fire: *Per Green, J.*, in *Gordon v. Buchanan*, 5 Yerg. 71, 82, S. P. In other respects the liability of both master and owners as common carriers has, in England, been modified by statutes, though these do not, like the statute there in respect to land carriers, expressly preclude the proper notice, or other mode of stipulation for farther protection: *Smith's Mercantile Laws*, 182-184; *Id.* 170, 171; *Ab. Sh.*, pt. 3, c. 5, Storey's ed. 1822, p. 297-303. But the statutes have probably been the main reliance of ship-owners.

The later English books are, however, by no means barren of cases going all lengths to the absolute protection of the carrier both by water and land. In *Evans v. Soule*, 2 Mau. & Sel. 1, a carrier by water from Bristol to Worcester, was allowed to protect himself against a loss in consequence of the vessel having sunk, under a public notice that all goods would be carried at the risk of the owners, unless the loss or damage should arise through the actual default of the master and mariners. The validity of the notice was not debated; but the counsel for the plaintiff, after assuming that the notice was valid within *Gibbon v. Paynton*, 4 Burr. 2298, and *Nicholson v. Willan*, 5 East, 507, contended, that it had been waived by the mode of the defendant's dealing. That view was overruled, and judgment given for the defendant. This decision was in 1813, Lord Ellenborough presiding, and we shall soon see how rapidly the easy surrender to a single encroachment, under the administration, too, of a very able jurist, led to a total conquest over what Chancellor Kent

denominates, and every lawyer must agree to have been, a most salutary rule in the law of carriers. How far he may stand justified in complimenting the firmness of the English courts in maintaining the rule will also be seen: 2 Kent Com. 601, 602, 3d. ed. Its form may still figure in our books; but I venture to say that if we yield one inch to the course of modern English adjudication, its spirit is gone. The obligation of common carriers will become as remarkable for its laxity as it has heretofore been for its rigor. I will only repeat in respect to this case, what seems to me perfectly obvious; and which I have, if not very unsuccessful, made somewhat apparent to others, that the difference between the two cases from Burrow and East, and that of *Evans v. Soule*, is, that the notices in the former went merely to protect against the fraud of the bailor, and the latter to conceal and favor fraud directed against the owner, and in favor of the party giving the notice. The one was for, and the other against, the public morals; the former said merely, "Give me a due reward, and I will be accountable as a common carrier;" the latter, "Give me the same reward" (for the carrier fixes it; it may be less, but it may also be more), "and yet, I claim to throw all risk upon you, or such a degree of it as I please." In the former, the plaintiff sought to commit and did commit actual frauds after express notice that he must be honest. He sought in that way to deprive the laborer of a reasonable reward for his hire. In the latter, he was paid all he demanded, and yet he refuses to carry under the obligation required by law.

Latham v. Rutley, 2 Barn. & Cress. 20, was a question of pleading, and no farther touches the point before us, than as it was assumed at *nisi prius* by Abbott, C. J., and the counsel in the cause, that a common carrier by land might give a receipt for goods, "fire and robbery excepted." In *Maving v. Tbdd*, 1 Stark. 72, A. D. 1815, before Lord Ellenborough, C. J., the first question submitted was, whether the defendants stood in the relation of common carriers to the plaintiff; and it was held that they did. The goods had been destroyed by fire; but the defendants brought to the knowledge of the plaintiff, a notice that they would not be responsible for losses by fire. Holroyd submitted whether the defendants could exclude their responsibility altogether. This was going farther than had been done in the case of carriers, who had only limited their responsibility to a certain amount. His lordship said: "Since they can limit it to a certain sum, I think they may exclude it altogether; and that they may say, we will have nothing to do with fire." Holroyd.

"They were bound to receive the goods." Lord Ellenborough: "Yes, but they may make their own terms. I am sorry the law is so; it leads to very great negligence." And the plaintiff was nonsuited. This case certainly goes the whole length. The goods were committed to the carrier in perfect fairness. A subsequent case in the same volume, *Leeson v. Holt*, 1 Stark. 186, A. D. 1816, is still broader. The defendants, common carriers, received chairs of the plaintiff to be carried from Nottingham to London; but they had published a notice that all packages of looking-glass, plate-glass, household furniture, toys, etc., were to be entirely at the risk of the owners as to damage, breakage, etc. The main question was, whether this notice had been brought to the knowledge of the plaintiff's agent; and the fact was submitted to the jury; in charging whom Lord Ellenborough, C. J., said: "If this action had been brought twenty years ago, the defendants would have been liable, since, by the common law, a carrier is liable in all cases except two: where the loss is occasioned by the act of God, or of the king's enemies using an overwhelming force, which persons of ordinary means of resistance can not guard against. It was found that the common law imposed upon carriers a liability of ruinous extent; and in consequence, qualifications and limitations of that liability have been introduced from time to time, till, as in the present case, they seem to have excluded all responsibility whatsoever; so that under the terms of the present notice, if a servant of the carriers had, in the most willful and wanton manner, destroyed the furniture intrusted to him, the principals would not have been liable. If the parties in the present case have so contracted, the plaintiff must abide by the agreement; and he must be taken to have so contracted, if he chooses to send his goods to be carried after notice of the conditions. The question then is, whether there was a special contract, etc." The jury found for the plaintiff on the question of his agent having seen the notice: See *Barney v. Prentiss*, 4 Har. & J. 317 [7 Am. Dec. 670].

Now in the first place, I feel quite happy to be assured by the charge of Lord Ellenborough, of what I think I had already collected from the cases, that there is no adjudication of a date anterior to the American revolution which sanctions the frittering away of the responsibility of a common carrier, by exceptions, provisos, special acceptances, or otherwise, for his own exclusive benefit, and having no respect to the duty of the bailor. The concluding note of Lord Coke to *Southcote's case*, cited to us from 4 Rep. 84, which though no more than his own opinion,

is yet high authority, has no specific application to the case of a carrier. He speaks of a special acceptance by bailees generally; and we have a distinction taken in *Kirkman v. Shawcross* and *Oppenheim v. Russell* against common carriers and innkeepers. And I feel quite confident that we have already seen a great deal of principle, and considerable in the shape of authority, and there is much more of both, running through the books, which go to sustain the distinction. With how much propriety Lord Ellenborough confined the date of the innovation to twenty years, is obvious by the previous remarks of Lord Kenyon, C. J. (A. D. 1793), in *Hide v. Proprietors of the Trent and Mersey Navigation*, 1 Esp. 36. He said: "There is a difference where a man is chargeable by law generally and where on his own contract. Where a man is bound to any duty, and chargeable to a certain extent by operation of law, in such cases, he can not by any act of his own discharge himself—as in the cases of common carriers, who are liable by law in all cases of losses, except those arising from the act of God, or of the king's enemies; they can not discharge themselves from losses happening under these circumstances, by any act of their own: as by giving notice for example to that effect. But the case is otherwise where a man is chargeable on his own contract. There he may qualify it as he thinks fit." See also *Jeremy's Law of Carriers*, 36.

All that Lord Ellenborough said in the two cases cited from 1 Starkie, certainly presses upon the mind when applied to ordinary bailees. They may make their terms; and we have seen the same thing as to carriers, so far as the terms are protective against the abuses of the bailor, or for the reasonable protection of the bailee, without hurt or serious inconvenience to the former. Nor am I able to make any distinction between a notice and a receipt or bill of lading. Being brought home to the plaintiff, the notice is equivalent to a special written contract. The cases, I believe, all agree in this. They may differ as to whether the restriction be a limitation of the contract, or only of damages under it, an exception, or a proviso, and so may or may not be set forth in pleading: *Clark v. Gray*, 6 East, 564; *Latham v. Rutley*, 2 Barn. & Cress. 20, and the cases there cited; but the terms of the notice, when they are admissible, enter into the framework of the bargain, and must in some form be so regarded. The cases in Starkie are *nisi prius* decisions, indicating on their face the haste and want of books which are so common at the circuit; and yet it is claimed, that they should at least strike a balance between conflicting authority, and surrender the

law which shelters the traveling and trading community to the discretion of its interested carriers. It is indeed true as Lord Ellenborough remarks, that there is no stopping-place, no half-way house. If the carrier can divest himself of liability for destruction by one kind of accident, or by one servant, he may in the same way go through the catalogue. He may exonerate himself at least from all, except gross neglect or misfeasance; and even in respect to these he compasses nearly the same end by inverting the *onus* and darkening the horizon of evidence. I have said, that relaxing the common law rigor opens the high-road to fraud, perjury, theft, and robbery. It does more. Looking to the present ordinary, not to say universal means of travel and transportation, by coaches, railroads, steamboats, packets, and merchant vessels, the mere superaddition of negligence in respect to the safety of passengers and property, would constitute a most fearful item. There are no principles in the law better settled than that whatever has an obvious tendency to encourage guilty negligence, fraud, or crime, is contrary to public policy. Such, in the very nature of things, is the consequence of allowing the common carrier to throw off or in any way to restrict his legal liability. The traveler and bailor is under a sort of moral duress, a necessity of employing the common carrier under those legal arrangements, which allow any number of persons to assume that character, and thus discourage and supersede the provision for other modes of conveyance.

My conclusion is, that he shall not be allowed in any form to higgie with his customer and extort one exception and another, not even by express promise or special acceptance, any more than by notice. He shall not be privileged to make himself a common carrier for his own benefit, and a mandatary, or less, to his employer. He is a public servant with certain duties defined by law; and he is bound to perform those duties. As Ashurst, J., said of the duties of innkeepers in *Kirkman v. Shaw*, they are indelible. An innkeeper is said to be indictable for extortion: *Per* Holroyd, J., in *Ansell v. Waterhouse*, 2 Chit. 4. The obligation of a jailer to keep his prisoners, is much like that of the carrier in keeping goods: *Bac. Abr.*, *Escape in Civ. Cas.* (H). He is also a public servant, and bound to perform the duties of his office. To demand and take an agreement for a special acceptance of his prisoner, would be extortion, and the qualification therefore void. In my opinion the same consequences result from the public character and absolute duties of the common carrier. I therefore think the defendants in the case at bar

must take the consequence of their obligation as common carriers, notwithstanding the notice to the plaintiff. Admitting that the plaintiff acceded in the clearest manner to the proposition in the notice that his baggage should be carried on the terms mentioned, I think the contract thus made was void on his part as contrary to the plainest principles of public policy.

In thus holding, we follow the law, as it is expressly admitted by the English judges, to have stood at the period when our ancestors declared themselves independent. And while we thus fulfill our constitutional duty, we are not, like Westminster Hall, obliged to lament while we enforce the law.

Being also of opinion that here was no neglect on the part of the plaintiff in any matter of duty which he owed the defendants, it follows that I am against the motion for a new trial upon the two points which I have heard argued.

I give no opinion upon the minor questions raised. They were argued before I came to the bench; and being points on which my brethren felt no difficulty, it was not thought worth while to call the attention of counsel to them on the second argument.

The chief justice dissented. He was of opinion that the plaintiff was chargeable with negligence, or at least want of ordinary care in not claiming his trunk before the coach left Hamilton, and that, therefore, the charge of the circuit judge, that the defendants were bound to deliver the trunk to the plaintiff on the arrival of the coach at Madison, qualified only by the knowledge of the plaintiff of the usage as to the removal of baggage from the coaches, was erroneous. The judge, in his opinion, should have submitted to the jury the question whether, in the exercise of that ordinary care incumbent upon all men in reference to their property, the plaintiff ought not to have inquired for his trunk before the coach proceeded on its journey; and if they should be of opinion that he was chargeable with negligence, or the want of that ordinary care, which prudent men, under similar circumstances, would have exercised, that then they should find a verdict for the defendants. For this reason, he was of opinion that a new trial ought to be granted.

New trial denied.

COMMON CARRIER, HIS POWER TO LIMIT HIS LIABILITY.—It is undoubtedly true that, as shown in the principal case and in the preceding case of *Hollister v. Nowlen*, at common law, a common carrier was held liable for all losses except those occasioned by the act of God or of the public enemies, being regarded as an insurer of the property committed to his charge. The law on the

subject under consideration is so clearly and fully stated in the opinions in these two leading cases, and the history of the decisions and of the legislative enactments on the subject, up to the time when they were rendered, is so admirably given by the two learned judges who delivered the opinions, that it will not be necessary to do more than trace the changes or modifications in the law, which have taken place since these decisions were rendered. In doing this we shall consider two questions: 1. Whether a common carrier can restrict his liability at all, or not; 2. Whether or not he can so restrict it by notices. It is generally agreed that, by the ancient common law, the carrier could not discharge himself from liability by any act of his own: See Lawson on Contracts of Carriers, sec. 24; Radfield on Carriers and Bailments, sec. 24, *et seq.* And although Judge Bronson, in *Hollister v. Nowlen*, says: "I shall not deny that the carrier may, by express contract, restrict his liability," yet Judge Cowen, in the principal case, says: "My conclusion is, that he shall not be allowed, in any form, to higgie with his customer, and extort one exception and another, not even by express promise or special acceptance any more than by notice." Here we have a distinct intimation of the latter's views upon the question of the carrier's power to limit his liability by express contract entered into between him and the owner of the property intrusted to him. However, as there was no question as to any express contract in the case, the remarks referred to above were mere dicta. But in the subsequent case of *Gould v. Hill*, 2 Hill, 623, decided by the same court in 1842, the opinion of the majority of the court was delivered by Cowen, J., Nelson, C. J., dissenting. In that decision Judge Cowen, said: "For myself, I shall do little more than refer to my opinion in *Cole v. Goodwin*, and the reasons for such opinion as stated in the course of that case. It was to the effect that I could no more regard a special acceptance as operating to take from the duty of the common carrier, than a general one. I collect what would be a contract from both instances, provided it be lawful for the carrier to insist on it; and such is the construction which has been given to both by all the courts. The only difference lies in the different kinds of evidence by which the contract is made out. When the jury have found that the goods were delivered with intent to abide the terms of the general notice, I understand a contract to be as effectually fastened upon the bailor as if he had reduced it to writing. Indeed, the contrary construction would, I think, be to tolerate a fraud on the part of the bailor. The true ground for repudiating the general notice is, therefore, its being against public policy; and this ground goes not only to the evidence—the mode in which you are to prove the assent—but to the contract itself. After forbidding the carrier to impose it under the form of a general notice, therefore, we can not consistently allow him to do the same thing in the form of a special notice or receipt. The consequences to the public would be the same whether we allow one form or the other." Although Judge Bronson concurred in the opinion delivered in this case, he would seem to have done so with some hesitation, for in the case of *Wells v. Steam Navigation Co.*, 2 N. Y. 204, decided by him after he became a judge of the court of appeals, he said: "It is perhaps a debatable question whether common carriers and innkeepers can contract for a more restricted liability than the law imposes upon them in the absence of a special agreement." The case of *Gould v. Hill* was however expressly denied by the supreme court in *Parsons v. Montecath*, 13 Barb. 353, and in *Moore v. Evans*, 14 Id. 524, in both of which cases it was decided that a carrier may, by express contract, limit his common law liability. And Parker, J., in delivering the opinion of the court in *Dorr v.*

New Jersey S. N. Co., 11 N. Y. 491, speaking of the two cases last cited, says: "In both those cases the question is examined with much ability, and I think the unsoundness of the conclusion in *Gould v. Hill* most satisfactorily shown. I am not aware that *Gould v. Hill* has been followed in any reported case."

GENERAL RULE.—But whatever may have been the case in former times, it is now well established as a general rule, both in this country and in England, that a common carrier may, by express agreement, limit his common law liability as an insurer of the property intrusted to him: *Lawson on Contracts of Carriers*, sec. 28; *Thompson on Carriers of Passengers*, 525; *Redfield on Carriers*, sec. 138 *et seq.*; *Story on Bail*, sec. 549; *Angell on Carriers*, sec. 225; *Schouler on Bail*, 450, *et seq.*; *Hutchinson on Carriers*, sec. 248; *Zunz v. South Eastern Railway Co.*, L. R., 4 Q. B. 539; *Peninsular & Oriental S. N. Co. v. Shand*, 11 Jur. (N. S.) 771; S. C., 12 L. T. (N. S.) 808; *Wilton v. Atlantic Royal Mail S. N. Co.*, 10 C. B. (N. S.) 453; *Austin v. Manchester, Sheffield & L. R. Co.*, 11 Eng. L. and Eq. 506; S. C., 21 L. J. (N. S.), C. P. 179; 10 C. B. 454; *Wyll v. Pickford*, 8 Mee. & W. 443; *Carr v. Lancashire etc. R. Co.*, 7 Exch. 707; *Taubman v. Pacific S. N. Co.*, 26 L. T. (N. S.) 704; *Glenister v. Great Western R. Co.*, 29 Id. 423; *Chitty on Law of Carriers*, 60, 77, 78; 1 Chit. Con. 690; *New Jersey S. N. Co. v. Merchants' Bank*, 6 Flow. (U. S.) 382; *York Co. v. Central R. R.*, 3 Wall. 107; *Railroad Co. v. Manufacturing Co.*, 16 Id. 318; *Mobile & Ohio R. R. Co. v. Jarboe*, 41 Ala. 644; *Southern Express Co. v. Crook*, 44 Id. 468; S. C., 4 Am. Rep. 140; *Grey v. Mobile Trade Co.*, 55 Ala. 387; S. C., 28 Am. Rep. 729; *South & North Ala. R. R. Co. v. Heinlein*, 56 Ala. 363; *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11; *Merchants' Dispatch & Trans. Co. v. Cornforth*, 3 Col. 280; S. C., 25 Am. Rep. 757; *Walch v. Boston & Albany R. R. Co.*, 41 Conn. 333; *Camp v. Hartford & N. Y. S. Co.*, 43 Id. 333; *Cooper v. Berry*, 21 Ga. 526; *Berry v. Cooper*, 28 Id. 543; *Central Line of Boats v. Lowe*, 50 Id. 509; *Merchants' Dispatch Trans. Co. v. Leysor*, 89 Ill. 43; *Merchants' Dispatch Trans. Co. v. Theilbar*, 86 Id. 71; *Chicago, B. & Q. R. R. Co. v. Hale*, 2 Ill. App. 150; *Ohio & Miss. R. Co. v. Selby*, 47 Ind. 471; S. C., 17 Am. Rep. 719; *Mich. S. & N. I. R. R. Co. v. Heaton*, 37 Ind. 448; S. C., 10 Am. Rep. 89; *St. Louis & S. E. R. Co. v. Smuck*, 49 Ind. 302; *L. L. & G. R. R. Co. v. Maris*, 16 Kan. 333; *St. Louis, K. C. & N. R. Co. v. Piper*, 13 Id. 505; *Louisville & N. R. R. Co. v. Brownlee*, 14 Bush, 590; *Adams Express Co. v. Guthrie*, 9 Id. 78; *Lemy v. P. R. R. Co.*, 23 La. Ann. 477; *Roberts v. Riley*, 15 Id. 103; *Little v. Boston & M. R. R. Co.*, 66 Me. 239; *Fillebrown v. Grand Trunk R. R. Co.*, 55 Id. 462; *McCoy v. Erie & W. T. Co.*, 42 Md. 498; *Bankard v. Baltimore & O. R. R. Co.*, 34 Id. 197; S. C., 6 Am. Rep. 321; *Pemberton Co. v. N. Y. C. R. R. Co.*, 104 Mass. 144; *Grace v. Adams*, 100 Id. 505; *Buckland v. Adams Express Co.*, 97 Id. 124; *Mich. C. R. R. Co. v. Hale*, 6 Mich. 243; *McMillan v. Mich. S. & N. I. R. R. Co.*, 16 Id. 79; *Shriver v. Sioux City & St. P. R. R. Co.*, 24 Minn. 506; S. C., 31 Am. Rep. 353; *Christenson v. American Express Co.*, 15 Minn. 270; S. C., 2 Am. Rep. 122; *Southern Express Co. v. Hunnicutt*, 54 Miss. 566; S. C., 28 Am. Rep. 385; *Mobile & O. R. R. Co. v. Weiner*, 49 Miss. 725; *Kirby v. Adams Express Co.*, 2 Mo. App. 369; *Drew v. Red Line T. Co.*, 3 Id. 495; *Moses v. Boston & M. R. R. Co.*, 24 N. H. 71; *Barter v. Wheeler*, 49 Id. 9; S. C., 6 Am. Rep. 434; *Kinney v. Central R. R. Co.*, 32 N. J. L. 407; *Hill v. Syr., Bing. & N. Y. R. R. Co.*, 73 N. Y. 351; S. C., 29 Am. Rep. 163; *Madan v. Sherrard*, Id. 329; *Weeks v. N. Y., N. H. & H. R. R. Co.*, 72 Id. 59; S. C., 28 Am. Rep. 104; *Spinetti v. Atlas S. S. Co.*, 80 Id. 71; S. C., 36 Am. Rep. 579; *Capehart v. Seaboard*

& *R. R. Co.*, 81 N. C. 438; *S. C.*, 31 Am. Rep. 505; *Lee v. Raleigh & G. R. R. Co.*, 72 N. C. 236; *Pittsburg, O. & St. L. R. Co. v. Barrett*, 36 Ohio St. 448; *Gaines v. Union Trans. & Ins. Co.*, 28 Id. 418; *Farnham v. Camden & A. R. R. Co.*, 55 Pa. St. 53; *Laing v. Colder*, 8 Id. 479; *Levy v. Southern Express Co.*, 4 S. C. 234; *Porter v. Southern Express Co.*, Id. 135; *S. C.*, 16 Am. Rep. 762; *Dillard v. L. & N. R. R. Co.*, 2 Lea, 288; *Nashville & C. R. R. Co. v. Jackson*, 6 Heisk. 271; *Blumenthal v. Brainerd*, 38 Vt. 402; *Va. & Tenn. R. R. Co. v. Sayers*, 26 Gratt. 328; *Wilson v. Chesapeake & O. R. R. Co.*, 21 Id. 654; *Brown v. Adams Express Co.*, 15 W. Va. 812; *Baltimore & O. R. R. Co. v. Skeels*, 3 Id. 556; *Baltimore & O. R. R. v. Rathbone*, 1 Id. 87; *White v. Goodrich T. Co.*, 46 Wis. 493; *Betts v. Farmers' L. & T. Co.*, 21 Id. 80; *Boorman v. American Express Co.*, Id. 152. In Iowa, sec. 1308 of the code provides that, "No contract, receipt, rule, or regulation, shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation, been made or entered into." The court held, in the case of *Brush v. S. A. & D. R. Co.*, 43 Iowa, 554, that this statute is not directed simply against contracts without consideration, but that it declares all contracts limiting the carrier's liability inoperative. And in that case it was decided that a contract which limited the carrier's liability at common law, in consideration for which the shipper received special rates and a pass over the road, was within this section of the code, and void. See also *McCoy v. K. & D. M. R. Co.*, 44 Id. 424. And in Texas, art. 278, tit. 13, p. 48, of the revised statutes, 1879, provides that, "Railroad companies and other common carriers of goods, wares, and merchandise, for hire, within this state, on land or in boats or vessels on the waters entirely within the body of this state, shall not limit or restrict their liability as it exists at common law, by any general or special notice, or by inserting exceptions in the bill of lading or memorandum, given upon the receipt of the goods for transportation, or in any other manner whatever, and no special agreement made in contravention of the foregoing provisions of this article shall be valid." These seem to be the only states whose legislatures have deemed it necessary to pass laws on this subject.

RESTRICTION ON POWER TO LIMIT LIABILITY IN AMERICA.—But while the English and American courts agree that common carriers may, by express contract, limit their common law liability, they differ very widely as to the extent of the power of limitation. In the case of *Peek v. North Staffordshire Railway Co.*, 10 H. L. Cas. 494, Mr. Justice Blackburn, after quoting a passage from Judge Story's work on bailments, published in 1832, to the effect that carriers could not exempt themselves from all responsibility in cases of gross negligence and fraud, either on their own part or on the part of their servants, says: "In my opinion, the weight of authority was, in 1832, in favor of this view of the law, but the cases decided in our courts between 1832 and 1854 established that this was not law, and that a carrier might by a special notice make a contract limiting his responsibility even in the cases here mentioned, of gross negligence, misconduct, or fraud on the part of his servants; and, as it seems to me, the reason why the legislature intervened in the railway and canal traffic act, 1854, was because it thought that the companies took advantage of those decisions (in Story's language) 'to evade altogether the salutary policy of the common law.'" The cases cited by the learned judge in support of his statement in reference to the decisions of the English courts between 1832 and 1854 are: *Shaw v. York & N. M. R. Co.*, 13 Q. B. 347; *Austin v. Manchester, S. & L. R. Co.*, 16 Id. 600; *Chippendale v. Lancashire*

4 *Y. R. Co.*, 21 L. J. (N. S.) Q. B. 22; *Austin v. Manchester, S. & L. R. Co.*, 10 C. B. 454; *Carr v. Lancashire & Y. R. Co.*, 7 Exch. (Wels. H. & G.) 707; *Walker v. York & N. M. R. Co.*, 2 El. & Bl. 750; *Gt. N. R. Co. v. Morville*, 21 L. J. (N. S.) Q. B. 319; *York N. & B. R. v. Crisp*, 14 C. B. 527; *Flughes v. Gt. W. R. Co.*, Id. 637; *Slim v. Gt. N. R. Co.*, Id. 647. And these cases certainly confirm the statement made in regard to them. These decisions produced very general dissatisfaction, and the legislature was constrained to provide a remedy, which it did by the enactment of the statute above referred to, 17 and 18 Vict., c. 31, sec. 7. This act provides that all companies doing business as common carriers shall be liable for the loss of, or for any injury done to horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such companies or their servants, notwithstanding any notice, condition, or declaration made and given by such companies contrary thereto, or in any wise limiting such liability, every such notice, condition, or declaration being declared null and void: *Provided* that said companies shall not be prevented from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable. This statute continues to regulate the greater part of the transportation business of Great Britain. Mr. Justice Bradley says in reference to this act: "The truth is, that this statute did little more than bring back the law to the original position in which it stood before the English courts took their departure from it:" *Railroad Co. v. Lockwood*, 17 Wall. 374.

The influences which, no doubt, led to the line of English decisions above referred to are thus forcibly referred to by Cockburn, L. C. J., in delivering his opinion in *Peck v. North Staffordshire R. Co.*, 10 H. L. Cas. 556: "The history of the judicial decisions which have taken place on contracts of this nature, and the legislation which has followed on those decisions, abundantly show that the act which your lordships are now considering, was passed by the legislature for the express purpose of protecting the public from the abuse of a power which the legislature itself, by assisting to create these great companies, had helped to bring into existence. Masters of the field, railway companies lost no time in introducing into their contracts conditions of immunity, not only against liability in respect of loss or injury arising from circumstances beyond their control, but also against liability in respect of loss or injury resulting from their own negligence, however gross and inexcusable. And to these stipulations courts of law felt themselves compelled to give effect, on the undeniable principle that, in the absence of fraud or illegality, courts of justice are bound to give effect to conditions, however stringent and and oppressive, to which the parties to a contract have deliberately agreed." But although the influences of the great transportation corporations which have come into being in this country since 1832, have been quite as powerful as those of the great companies referred to by Chief Justice Cockburn, it is highly creditable to the American judiciary, that in all the states of the union, save one, where the question has been directly passed upon, the courts have firmly adhered to the rule laid down by Judge Story in 1832. And it is well established in this country both in the supreme court of the United States and in the courts of all the states, with the single exception of New York, that a common carrier can not, even by express contract, limit his liability for loss or damage resulting from negligence or fraud either on his own part or on the part of his servants or agents: *Railroad Co. v. Lockwood*, 17 Wall. 357; *Rail-*

road Co. v. Pratt, 22 Id. 123; *South & North Ala. R. R. Co. v. Heinlein*, 56 Ala. 368; *Hooper v. Wells*, 27 Cal. 11; *Merchants' Despatch & Trans. Co. v. Cornforth*, 3 Col. 280; S. C., 25 Am. Rep. 757; *Welch v. Boston & A. R. R. Co.*, 41 Conn. 333; *Flinn v. Phila. W. & B. R. R. Co.*, 1 Houst. 469; *Berry v. Cooper*, 28 Ga. 543; *Erie Railway Co. v. Wilcox*, 84 Ill. 239; S. C., 25 Am. Rep. 451; *Ohio & M. R. Co. v. Selby*, 47 Ind. 471; S. C., 17 Am. Rep. 719; *St. Louis & N. R. Co. v. Piper*, 13 Kan. 505; *Rhodes v. L. & N. R. R. Co.*, 9 Bush, 688; *School District v. Boston H. & E. R. R. Co.*, 102 Mass. 552; S. C., 3 Am. Rep. 502; *Hawkins v. Gt. W. R. R. Co.*, 17 Mich. 57; *Shriver v. S. C. & St. P. R. R. Co.*, 24 Minn. 506; S. C., 31 Am. Rep. 353; *Southern Ex. Co. v. Hunnicutt*, 54 Miss. 566; S. C., 28 Am. Rep. 385; *Drew v. R. L. T. Co.*, 3 Mo. App. 495; *A. & N. R. R. Co. v. Washburn*, 5 Neb. 117; *Capehart v. S. & R. R. R. Co.*, 81 N. C. 438; S. C., 31 Am. Rep. 505; *Union Ex. Co. v. Graham*, 26 Ohio St. 595; *Pa. R. R. Co. v. Butler*, 57 Pa. St. 335; *Swindler v. Hilliard*, 2 Rich. (S. C.) 286; *N. & C. R. R. Co. v. Jackson*, 6 Heisk. 271; *Va. & Tenn. R. R. Co. v. Sayers*, 26 Gratt. 328; *Brown v. Adams Express Co.*, 15 W. Va. 812. Mr. Lawson, in his work on contracts of carriers, sec. 67, says that the question whether or not the carrier can protect himself from liability for loss or damage to property intrusted to him, arising from the negligence of himself or of his agents or servants, is still an open one in Wisconsin. The question does not yet seem to have been directly passed upon by the supreme court of that state; but from the remarks of Orton, J., in delivering the opinion of the court in *Morrison v. P. & C. C. Co.*, 44 Wis. 410, 411; S. C., 28 Am. Rep. 599, it can hardly be doubted that the decision of that court will be in accordance with those of the other states cited above, whenever the question comes directly before it. Mr. Lawson also says, sec. 66, that "In West Virginia a common carrier may, by contract, absolve himself from all liability resulting from any and every degree of negligence short of fraud, provided the contract is clear that such was the intention of the parties to it." He cites *Baltimore & Ohio R. R. Co. v. Rathbone*, 1 W. Va. 87, and *Baltimore & Ohio R. R. Co. v. Skeels*, 3 Id. 556. The former of these cases fully sustains the statement quoted above. In the latter, this precise point was not decided, but Berkshire, J., who decided both cases, seems to doubt the correctness of his position in the former one, for he says: "The authorities, so far as I have been able to extend my examination, are uniform to this point, and it seems well agreed, that by express stipulation in the contract to that effect, they may at least exonerate themselves from all liability that does not arise from the want of ordinary care and diligence on their part." But the case of *Baltimore & Ohio R. R. Co. v. Rathbone*, was expressly overruled, by a unanimous court, in the case of *Maslin v. B. & O. R. R. Co.*, 14 W. Va. 180; S. C., 35 Am. Rep. 748. Green, P., who delivered the opinion in that case, ably reviewed the English and American decisions on the question and laid it down as undoubted law in this country, that "a common carrier for hire by special contract, though based on a valuable consideration, can not exempt himself from loss or damage, which has in any degree been caused by his own negligence or that of his servants." The latter case was affirmed and followed in the subsequent case of *Brown v. Adams Express Co.*, 15 W. Va. 812, and must now be considered as the law in West Virginia.

NEW YORK DOCTRINE.—The courts of New York have carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence: *Mynard v. Syr.*, *B. & N. Y. R. R. Co.*, 71 N. Y. 180; S. C., 27 Am. Rep. 28; *Cragin v. N. Y. C. R. R. Co.*, 51 N. Y. 61; S. C., 10 Am. Rep. 559; *Poucher v. N. Y. C.*

R. R. Co., 49 N. Y. 263; *S. C.*, 10 Am. Rep. 364; *Bissell v. N. Y. C. R. R. Co.*, 25 N. Y. 442. But the present tendency of the courts of that state would seem to be rather to restrict than to extend this doctrine. And the contract will not be deemed to except losses occasioned by the carrier's negligence unless that be expressly stipulated: *Magnin v. Dinsmore*, 56 N. Y. 168; *Blair v. Erie R. Co.*, 66 Id. 313; *Mynard v. Syr., B. & N. Y. R. R. Co.*, 71 Id. 180, 185. In the case last cited it was decided that where words in the contract may operate without including the negligence of the carrier or his servants, it will not be presumed that they were intended to include it; every presumption is against such intention, unless it is expressed in unequivocal terms. And the court there held that the words "from whatsoever cause arising" used in such a contract, did not include a loss arising from the negligence of the carrier.

EFFECT OF CONTRACT LIMITING LIABILITY.—In Pennsylvania it is held that the effect of the special contract is to convert the common carrier into a special bailee for hire, whose duties are governed by his contract, and against whom, if negligence is charged, it must be proved by the party injured: *Farnham v. C. & A. R. R. Co.*, 55 Pa. St. 53; *American Express Co. v. Sands*, Id. 140. The great weight of authority, however, seems to be against this doctrine, and in favor of that contended for by Mr. Justice Bradley, in his celebrated decision in *Railroad Co. v. Lockwood*, that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest, and that those responsibilities may vary without changing the character of the employment. In discussing this subject, he says: "And if by special agreement the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of the employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risk of inevitable accidents in the carriage of his goods? Suppose the contract relates to a single crate of glass or crockery, whilst at the same time the carrier receives from the same person twenty other parcels, respecting which no such contract is made. Is the company a public carrier as to the twenty parcels, and a private carrier as to the one?" See also *Brown v. Adams Express Co.*, 15 W. Va. 817; *Steele v. Townsend*, 37 Ala. 247; *Graham v. Davis*, 4 Ohio St. 362; *Davidson v. Graham*, 2 Id. 131; *Baker v. Brinson*, 9 Rich. (S. C.) 201; *Swindler v. Hilliard*, 2 Id. 305; *Dress v. R. L. T. Co.*, 3 Mo. App. 495; *Kirby v. Adams Ex. Co.*, 2 Id. 369; *Ketchum v. Am. M. U. Ex. Co.*, 52 Mo. 390; *Levering v. U. T. & I. Co.*, 42 Id. 88. In the case of *Kirby v. Adams Ex. Co.*, 2 Mo. App. 377, *Bakewell, J.*, in delivering the opinion of the court, says: "A common carrier may, by contract, restrict his liability as an insurer, but his duties as a common carrier do not originate in contract, and he will not be permitted, whilst acting as a common carrier for hire, to shirk the responsibilities which the law affixes to his calling, and to assume the position of an ordinary bailee. The law still holds him to a higher degree of care than that required of a private carrier; and the rule of evidence which, for the wisest reasons, has been adopted in this regard, must still prevail. The consignor does not accompany his goods; the carrier does. The carrier must account for them, and if they are lost,

whatever agreement he may have made with the owner, the law will presume that they are lost by his fault, and, in the absence of testimony to rebut this presumption, he must pay their value."

DEGREES OF NEGLIGENCE.—In the case of common carriers, it is well settled in this country that there are no degrees of negligence, as ordinary, gross, or slight. Any negligence is considered gross in one who undertakes to perform a duty and fails to perform it. Mr. Justice Bradley in discussing this subject, says: "Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate, perhaps, to call it simply 'negligence.'" *Railroad Co. v. Lockwood*, 17 Wall. 382. See also *Laws. Con. Car.*, sec. 130; *Story on Bail.*, sec. 571; *Thomp. Car. Pass.*, 207; *Steamboat New World v. King*, 16 How. (U. S.) 474.

LIABILITY OF CARRIER, HOW FAR RESTRICTED BY NOTICE.—The doctrine laid down in the principal case, and in that of *Hollister v. Noden*, ante, 455, that a common carrier can not restrict or limit his common law liability by general notices, even though the contents of such notices are brought home to the knowledge of the party; but that, in the absence of evidence of his assent to the terms thereof, the implication is as strong that he intended to insist upon his rights and the duties of the carrier, as it is that he consented to their limitation or qualification, may be regarded as the settled American rule on this subject: *Railroad Company v. Manufacturing Company*, 16 Wall. 318; *Southern Ex. Co. v. Armstead*, 50 Ala. 350; *Southern Ex. Co. v. Caperton*, 44 Id. 101; S. C., 4 Am. Rep. 118; *Little v. Boston & Me. R. R.*, 66 Me. 239; *Mobile & O. R. R. Co. v. Weiner*, 49 Miss. 725; *Moses v. Boston & Me. R. R.*, 24 N. H. 71; *McMillan v. Mich. S. & N. I. R. R. Co.*, 16 Mich. 79; *Manu v. Birchard*, 40 Vt. 326; *Derwort v. Loomer*, 21 Conn. 245; *Dorr v. N. J. S. N. Co.*, 11 N. Y. 485; *I. & C. R. R. Co. v. Cox*, 29 Ind. 300; *Ill. O. R. R. Co. v. Frankenberg*, 54 Ill. 88; S. O., 5 Am. Rep. 92; *Southern Ex. Co. v. Newby*, 36 Ga. 635; *Adams Ex. Co. v. Nock*, 2 Duval, 562; *Davidson v. Graham*, 2 Ohio St. 131; *Levering v. Union T. & I. Co.*, 42 Mo. 88; *Judson v. Western R. R. Co.*, 6 Allen, 486; *Brown v. Adams Ex. Co.*, 15 W. Va. 812. In Pennsylvania, and it seems in North Carolina, it is held that a carrier can, by notice brought to the knowledge of the shipper, restrict his liability: *Laing v. Colder*, 8 Pa. St. 479; *Capehart v. S. & R. R. Co.*, 81 N. C. 438; S. C., 31 Am. Rep. 505. But in the Pennsylvania case, Bell, J., delivering the opinion of the court, says on this subject: "The expediency of recognizing in him a right to do so by a general notice, such as was given here, has been strongly and justly questioned, and, in some of our sister states, altogether denied. Were the question an open one in Pennsylvania, I should, for one, unhesitatingly follow them in repudiating a principle which places the bailor absolutely at the mercy of the carrier, whom, in a vast majority of instances, he can not but choose to employ."

NOTICE IS GENERALLY TREATED MERELY AS A PROPOSAL for a contract, the acceptance of which must be shown in order to bind the party to whom such proposal is made. But when the terms of a notice are just and reasonable, are

brought home to the knowledge of the shipper, before or at the time of the delivery of the goods, and are assented to by him, the notice and assent are equivalent to an express contract between the parties: *Blumenthal v. Brainerd*, 38 Vt. 410, Laws. Con. Car., sec. 101; 2 Redf. on Railways, 96, 97, 5th ed. The question, then, as to what constitutes sufficient evidence of assent on the part of the shipper, is one of great practical importance, and one upon which there exists considerable diversity of opinion. In discussing this subject, Justice Redfield, in his work on railways, vol. 2, sec. 177, says: "But a notice, brought home to the owner of goods as evidence, merits a very different consideration, in this species of bailment, from any other, where there is no obligation upon the bailee to assume the duty. In the case of a carrier, with whom it is not optional altogether whether to carry goods offered or not, but where he must carry such goods as he is accustomed to carry, upon the general terms of liability imposed by the law, or submit to an action for damages, and where every one desiring goods carried has the option to have them carried without restriction of the carrier's duty, unless he choose to waive some portion of his legal rights, for present convenience or ultimate peace; the mere fact of such a notice, restricting the carrier's liability, being brought home to the knowledge of the owner of goods, before or at the time of depositing them with the carrier, is no certain ground of inferring whether the carrier consented to recede from his notice and perform the duty which the law imposes upon him, or the owner of the goods consented to waive some portion of his legal rights. Perhaps, upon general grounds of inference, it might be regarded as more logical and more reasonable to infer that the carrier receded from an illegal pretension, than the owner of the goods from a legal one. At all events, to exonerate the carrier from his general liability, he must show, at the least, it would seem, that the owner assented to the demands of the notice, or acquiesced in it, by making no remonstrance." There are two circumstances which, in our judgment, have very much complicated the determination of the question which we are now discussing. The first of these is the fact that a carrier is bound by law to carry all such goods as he is accustomed to carry or be liable to an action for refusing. Were it not for this fact, it seems to us that when a carrier has given notice that he will carry goods on certain conditions only, and the shipper, with full knowledge of this notice, continues to deliver his goods to him for carriage, he should be considered as agreeing that they should be carried according to the terms of the notice. The other circumstance to which we refer, is the well-known fact that in modern times carriers have generally endeavored, by the most sweeping provisions in their notices, to shirk and evade every kind of responsibility for the safe conveyance of property intrusted to them. This fact has, in this country at least, and, as we think, very justly, led the courts to scrutinize very closely the evidence of the shipper's assent to the contract imposed upon him by the carrier. Parsons, while admitting the difficulty of distinguishing a notice from the carrier made known to the shipper, from an express contract, states his views upon the subject in the following extract: "Undoubtedly it may be difficult to discriminate very clearly between the case where the carrier and the sender expressly agree that the carrier shall not be responsible for the property, and that in which the carrier says to the sender: 'If you send goods by me, I will not be responsible for them;' and the sender thereafter, without reply, sends goods by him. But we think there may be a real difference. The rule of law, derived from public policy, may not go so far as to say that the carrier and the sender shall not agree upon the terms on which the goods are to be transported; but it may nevertheless

say, that the carrier has neither the right to force such an agreement on the sender, nor to infer, merely from his silence, that he accepts the proposed terms. He may be silent, either because he assents to them, or because he disregards them and chooses to stand upon the rights which the law secures to him. The sender, who may be a passenger about to enter a boat or a car with his baggage, learns, by reading the ticket which he buys, that if he puts that baggage on board it will be at his own risk all the way. He has a right to disregard such notice; to say it is not true; to deliver his baggage to the proper person, placing it under the responsibilities which lie upon the carrier by the general law. To hold otherwise would be to say, not merely that carrier and sender may agree to relieve the carrier from his peculiar liability, but that the carrier has a right to force this agreement on the sender; which is a very different thing." In the case of *Buckland v. Adams Express Company*, 97 Mass. 131, Bigelow, C. J., speaking of the law of that state, says: "It is also settled that assent is not necessarily to be inferred from the mere fact that knowledge of such notice on the part of an owner or consignor of goods is shown. The evidence must go further and be sufficient to show that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties according to which the service of the carrier was to be rendered." To substantially the same effect are *Judson v. Western R. R. Co.*, 6 Allen, 486; *N. J. S. N. Co. v. Merchants' Bank*, 6 How. (U. S.) 383; *Moses v. Boston & Me. R. R.*, 24 N. H. 71.

FACTS FROM WHICH ASSENT IS INFERRED.—It is generally held that a shipper, by accepting and acting upon a bill of lading, makes its stipulations, if just and reasonable, the terms of the special contract between him and the carrier. In the absence of fraud or mistake it will be presumed that he read it, and his acceptance of it, without dissent, will be considered sufficient evidence of his assent to its terms and conditions, although it was not signed by him: *Laws. Con. Car.*, sec. 102; *Grace v. Adams*, 100 Mass. 505; S. C., 1 Am. Rep. 131; *Steele v. Townsend*, 37 Ala. 247; *Mulligan v. Ill. Cent. R. Co.*, 36 Iowa, 181; *Cia. H. & D. & D. & M. R. R. Co. v. Pontius*, 19 Ohio St. 221; S. C., 2 Am. Rep. 391; *Boorman v. Am. Ex. Co.*, 21 Wis. 152; *McMillan v. Mich. S. & N. I. R. R. Co.*, 16 Mich. 79; *Hopkins v. Westcott*, 7 Am. L. Reg. (N. S.) 533; *Kallman v. U. S. Ex. Co.*, 3 Kan. 205; *Kirkland v. Dinmore*, 62 N. Y. 171. But in Illinois it is held that the simple delivery of a receipt to a shipper of goods is not conclusive upon him; and whether or not he had knowledge of its terms, and assented to its restrictions, is for the jury to determine as a question of fact upon evidence *aliunde*, and all the circumstances attending the giving of the receipt are admissible in evidence, to enable the jury to determine the fact: *Am. M. N. E. Co. v. Schier*, 55 Ill. 140; *Adams Ex. Co. v. Haynes*, 42 Id. 89.

INSUFFICIENT EVIDENCE OF ASSENT.—Evidence that often, but not invariably, the carrier had given to the shipper receipts containing a printed clause limiting his liability for goods transported by him, and that in the particular instance, after receiving the goods, he gave to the servant of the plaintiff a receipt containing such a printed clause, but over such clause in the receipt a stamp was so pasted as to render it unintelligible, and that until after the loss, neither the shipper nor any of his agents or servants had actual knowledge of such a clause in this or any of the other receipts, was held not sufficient to warrant a finding that the shipper assented to any limitation of the carrier's liability: *Perry v. Thompson*, 98 Mass. 249. So proof that the shipper of stock paid for their transportation according to a tariff of charges

under which, by the carrier's printed table of rates, the latter assumed no responsibility for certain losses, was held not to be sufficient evidence that the terms were assented to by the shipper: *Baltimore & O. R. R. Co. v. Brady*, 32 Md. 333.

NOTICES GIVEN BY ADVERTISEMENTS in newspapers, by posting up placards, by printing them on the backs of receipts or bills of lading, or on papers attached to such receipts, are generally held to be insufficient to limit the liability of the carrier: *Baldwin v. Collins*, 9 Rob. 468; *Brooke v. Pickwick*, 4 Bing. 218; *Macklin v. N. J. S. Co.*, 7 Abb. Pr. (N. S.) 229; *Gleason v. Goodrich Trans. Co.*, 32 Wis. 85; S. C., 14 Am. Rep. 716; *Lake Shore & M. S. R. Co. v. Greenwood*, 79 Pa. St. 373; *Malone v. Boston & W. R. R. Co.*, 12 Gray, 388; *Peck v. Weeks*, 34 Conn. 145; *Newell v. Smith*, 49 Vt. 255; *Western T. Co. v. Newhall*, 24 Ill. 466; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318. In the case last cited Mr. Justice Davis, in discussing this subject, says: "These considerations against the relaxation of the common law responsibility by public advertisements, apply with equal force to notices having the same object, attached to receipts given by carriers on taking the property of those who employ them into their possession for transportation. Both are attempts to obtain, by indirection, exemption from burdens imposed in the interests of trade upon this particular business. It is not only against the policy of the law, but a serious injury to commerce to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice, whether it be general to the public or special to a particular person, merely because he does not expressly dissent from them. If the parties were on an equality in their dealings with each other, there might be some show of reason for assuming acquiescence from silence, but in the nature of the case this equality does not exist, and therefore, every intendment should be made in favor of the shipper when he takes a receipt for his property, with restrictive conditions annexed, and says nothing, that he intends to rely upon the law for the security of his rights. It can readily be seen, if the carrier can reduce his liability in the way proposed, he can transact business on any terms he chooses to prescribe. The shipper, as a general thing, is not in a condition to contend with him as to terms, nor to wait the result of an action at law in case of refusal to carry unconditionally. Indeed such an action is seldom resorted to, on account of the inability of the shipper to delay sending his goods forward. The law, in conceding to carriers the ability to obtain any reasonable qualification of their responsibility by express contract, has gone as far in this direction as public policy will allow. To relax still further the strict rules of the common law applicable to them, by presuming acquiescence in the conditions on which they propose to carry freight when they have no right to impose them, would, in our opinion, work great harm to the business community."

NOTICES PRINTED OR STAMPED ON TICKETS OR CHECKS have no effect to limit the liability of carriers. Neither a ticket nor a check is any evidence of a contract: *Wilson v. Chesapeake & Ohio R. R. Co.*, 21 Gratt. 654; *Quimby v. Vanderbilt*, 17 N. Y. 306; *Burnham v. G. T. R. Co.*, 63 Me. 298; S. C., 18 Am. Rep. 220; *Brown v. Eastern R. R. Co.*, 11 Cush. 97; *Henderson v. Stevenson*, L. R., 2 Sc. & Div. 470; *Blossom v. Dodd*, 43 N. Y. 264; S. C., 3 Am. Rep. 701; *Indianapolis R. Co. v. Cox*, 29 Ind. 360. Such notices will not bind the passenger, unless his express assent is shown; and the acceptance of the ticket or check is no evidence of such assent. The real contract is always made before the ticket or check is taken by the passenger, and it would be manifestly unjust to hold that he is bound by the terms of any notice printed

or stamped upon it. He has no idea when he receives and accepts it that it is anything more than a mere voucher for the money he has paid for it and an evidence of his right to be carried, or to have his baggage carried, a certain distance: *Rawson v. Pa. R. R. Co.*, 48 N. Y. 212; S. C., 8 Am. Rep. 543; *Madan v. Sherrard*, 73 N. Y. 329; S. C., 29 Am. Rep. 153.

MANNER IN WHICH NOTICES ARE PRINTED on tickets or checks is sometimes considered as a matter of importance in determining whether or not the party who receives them shall be bound by them. Thus it was decided in *Ferner v. Sweitzer*, 32 Pa. St. 208, that emblazoning the general object on a check in large letters, but stating the restriction in small ones was not sufficient to render the notice effectual. And in *Butler v. Heane*, 2 Camp. 415, decided by Lord Ellenborough in 1810, it was held that a notice by a common carrier, blazoning the advantages of his conveyances, and stating in small characters at the bottom of the bill that he would not be answerable for goods above the value of five pounds, unless entered as such, and paid for accordingly, was insufficient to limit his common law liability. In *Camden & A. R. R. Co. v. Bahlauf*, 16 Pa. St. 67, it was held that where the ticket was printed in English and the passenger was a German who did not understand English, the notice of limitation upon the ticket was ineffectual unless the terms of it were explained to him. So in *Grace v. Adams*, 100 Mass. 505; S. C., 1 Am. Rep. 131, a case in which the limitations on a receipt were upheld, the court says, "and the terms and conditions are expressed in the body of it in a way not calculated to escape attention."

NOTICE, WHEN EFFICIENT, WITHOUT ASSENT, TO LIMIT LIABILITY. — There is one exception to the general American rule, that a common carrier can not limit his liability by notice merely, without evidence of the shipper's assent to its terms and conditions. This exception is thus stated by Greenleaf: "It is now well settled, that a common carrier may qualify his liability by a general notice to all who may employ him of any reasonable requisition to be observed on their part, in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight, and the like; as for example, that he will not be responsible for goods above the value of a certain sum, unless they are entered as such, and paid for accordingly." This extract has been very frequently quoted by courts and text-writers, and always with approval. Its doctrine is, as the reader will perceive, fully admitted in the principal case, and has ever since been sustained by the courts in every state of the union: *McMillan v. Mich. S. & N. I. R. R. Co.*, 16 Mich. 79, 110; *Judson v. Western R. R. Co.*, 6 Allen, 486, 493; *Moses v. Boston & Me. R. R. Co.*, 24 N. H. 71, 90; *Orange County Bank v. Brown*, 24 Am. Dec. 129; *Farmers and Mechanics' Bank v. Champlain Trans. Co.*, 23 Vt. 186, 206; *Oppenheimer v. U. S. Ex. Co.*, 69 Ill. 62; S. C., 18 Am. Rep. 596; *Erie R. Co. v. Wilcox*, 84 Id. 239; S. C., 25 Am. Rep. 451; Ang. on Car., sec. 245; Laws. Con. Car., sec. 88; *Magnin v. Dinwmore*, 62 N. Y. 35; S. C., 20 Am. Rep. 442. The grounds upon which the American courts base the justice of this exception are, the right of the carrier to have this information, in order that he may be able to vary his charges and determine the care which he ought to bestow upon the goods, and the fraud practiced upon him by the carrier's withholding it from him: Laws. Con. Car., sec. 88. But where the carrier does not give any notice, and does not make any inquiry of the shipper as to the value of the goods, the former will be liable for the full value of them: *Brown v. Camden & A. R. R. Co.*, 83 Pa. St. 316; *Little v. Boston & Me. R. R.*, 66 Me. 239; *Levois v. Gale*, 17 La. Ann. 302; *Phillips v. Earle*, 8 Pick. 182. And where the value of goods is apparent a

statement of their value is unnecessary: *Laws. Con. Car., sec. 93; Southern Ez. Co. v. Crook*, 44 Ala. 468; S. C., 4 Am. Rep. 140; *Boskowitz v. Adams Ex. Co.*, 5 Cent. L. J. 58.

The principal case is cited in *Gould v. Hill*, 2 Hill, 624, by Cowen, J., who in deciding that case said he would do little more than refer to his opinion in *Cole v. Goodwin*, and the reasons there given for such opinion. It is also cited in the cases given below to the following points: That an inn-keeper is liable for goods of his guest delivered to him: *Needles v. Howard*, 1 E. D. Sm. 61; *Wilkins v. Earle*, 19 Abb. Pr. 192; 3 Rob. 365. That money in a trunk of a traveler for his expenses is properly considered as baggage: *Taylor v. Monnot*, 4 Duer, 119. That a usage in reference to the business of a common carrier, which is not known to his customer, does not affect the latter: *Haslam v. Adams Ex. Co.*, 6 Bosw. 243. That the fact that a passenger leaves the coach without claiming his baggage does not absolve the carrier from liability: *Cary v. Cleveland & T. R. R. Co.*, 29 Barb. 47. The opinion expressed by Cowen, J., in the principal case, that a carrier could not in any way restrict his common law liability, is questioned in *Parsons v. Monteath*, 13 Barb. 358. It is cited in *Maslin v. Baltimore & O. R. R. Co.*, 14 W. Va. 98, as a case showing that for a long time the New York courts resisted all attempts of common carriers to restrict their common law liability. For other cases where *Cole v. Goodwin* is cited with *Hollister v. Nowlen*, *ante*—see the citations at the end of that case.

WRIGHT v. WILCOX AND WILCOX.

[19 WENDELL, 343.]

MASTER IS NOT LIABLE FOR WILLFUL MISCHIEF of his servant.

TO CHARGE THE MASTER FOR THE ACT OF HIS SERVANT, it must be shown that the relation of master and servant subsisted between them in the particular affair.

FOR CARELESS MISTAKE OF A SERVANT, either of omission or commission, while in the discharge of his master's business, the latter is answerable.

WILLFUL ACT OF A SERVANT is deemed to be a departure from the master's business.

IN AN ACTION ON THE CASE AGAINST A MASTER AND SERVANT JOINTLY, no recovery can be had against the former, if the injury resulted from the willful malicious act of the latter.

CASE. The plaintiff's minor son was run over by a wagon driven by S. Wilcox, son of J. Wilcox. The son driving the wagon was in the employment of his father. The lad who was hurt asked leave to ride in the wagon, which was granted. The boy attempted to get on the wagon, taking hold of the side between the hind and front wheels. S. Wilcox did not stop his team, though warned by a by-stander that if he did not the lad would be killed. Looking behind and seeing other boys as well as plaintiff's trying to get on the wagon, he whipped his

horses from a walk into a trot. The plaintiff's son fell off and was seriously injured by one of the hind wheels. This was a joint action against Wilcox and his son. Motion for nonsuit was denied. The jury was instructed that both defendants were liable, whether the injury resulted from negligence or willful mischief. Verdict against both defendants for one hundred and nine dollars damages. They moved for a new trial.

J. Williams and S. Stevens, for the motion.

M. T. Reynolds, contra.

By Court, COWEN, J. In a case of strict negligence by a servant while employed in the service of his master, I see no reason why an action will not lie against both jointly. They are both guilty of the same negligence at the same time, and under the same circumstances; the servant in fact, and the master constructively, by the servant his agent. Mr. Hammond lays down the rule in this way: "Whether the principal and inferior may be charged jointly, depends on whether the inferior is liable as a trespasser *vi et armis*, or in case only. If the latter, they may be sued together, but otherwise, if the former, it being held, how justly may be questioned, that a principal is liable for his agent's misconduct only in case:" Ham. on Part. to Actions, 85, 86. The rule is, in the main, doubtless right, but seems to be shaken by *Moreton v. Hardern*, 6 Dow. & Ry. 275, in respect to the quality of the servant's act. There were, in that case, three proprietors of a coach: one was driving and ran against the plaintiff's cart. All three were sued in case; and several judges thought either trespass or case would lie against the driver, though the mischief arose from mere negligence; but all agreed that case only would lie against the other two who were absent; yet the action was maintained against all three.

But it is impossible to sustain this verdict against the father. It is difficult to infer from the evidence, anything short of a design in Stephen, the servant, to throw the plaintiff's boy from the wagon; and the judge, as I understand the charge, told the jury that the defendants were jointly liable in that view. If Stephen, in whipping the horses, acted with the willful intention to throw the plaintiff's boy off, it was a plain trespass, and nothing but a trespass, for which the master of Stephen is no more liable than if his servant had committed any other assault and battery. All the cases agree that a master is not liable for the willful mischief of his servant, though he be at the time, in other respects, engaged in the service of the former: 1 Chit. Pl. 69, ed.

of 1828; *McManus v. Crickett*, 1 East, 106; Ham. on Part. to Actions, 83; *Croft v. Alison*, 4 Barn. & Ald. 590; 1 Chit. Gen. Pr. 80; *Bowcher v. Noidstrom*, 1 Taunt. 568. Why is the master chargeable for the act of his servant? Because, what a man does by another he does by himself. The act is within the scope of the agency: Reeve Dom. Rel. 357. "A master is not answerable," says Mr. Hammond, "for every act of his servant's life, but only for those done in his relative capacity. To charge the master, it must always be shown or presumed, that the relation of master and servant subsisted between them in the particular affair. If the master is liable under other circumstances, he is so, not *quatenus* master, but as any one would be who instigates an injury." The dividing line is the willfulness of the act. If the servant make a careless mistake of commission or omission, the law holds it to be the master's business negligently done. It is of the very nature of business that it may be well or ill done. We frequently speak of a cautious or careless driver in another's employment. Either may be in the pursuit of his master's business, and negligence in servants is so common, that the law will hold the master to the consequences as a thing that he is bound to foresee and provide against.

But it is different with a willful act of mischief. To subject the master in such a case, it must be proved that he actually assented, for the law will not imply assent. In the particular affair, there is, then, no longer the presumed relation of master and servant. The distinction seems to resolve itself into a question of evidence. A man shall be presumed to intend the ordinary consequences of his own acts; and especially so far as such consequences may be innocent of all evil intention; for these he may be safely held accountable. But for those which are remote or barely possible, he is not accountable; and if they be at the same time criminal, it would be violating one of the plainest principles of presumptive evidence, to say that he intended them. "The master's liability has never been questioned," says Judge Reeve, "when a servant does an act injurious to another, through negligence or want of skill, on the principle that the master should at his peril employ servants who are skillful or careful." Reeve Dom. Rel. 357, 358. He admits that the English cases deny the master's liability where the servant's act is willful, but questions the soundness of the distinction, if the willful act be done in the immediate performance of his master's business; in which I understand the learned judge at the circuit to have followed him in the case at bar. The answer is that the law

holds such willful act a departure from the master's business. Judge Reeve remarks that one of two innocent persons must suffer, and that should be the man who put it in the power of the servant to do the injury; and the reason is as strong that the master should run the risk of his servant's unruly passions, as his want of care. Clearly the argument proves too much. It would make the master accountable for every mischievous act of the servant, which he is enabled to commit in consequence of the general relation; for aught I see, including the credit which the servant may obtain with his merchant. The learned writer puts a distinction involving the very question we are considering. A servant driving a wagon, leaves it and commits an assault and battery; for that he admits the master is not liable; otherwise, if he should drive it violently over a man with intent to injure him. "In the first place (he says), the servant had abandoned his master's business; in the latter he was in the immediate pursuit of it; in the first he was not driving his master's wagon, in the last he was." Now the authorities deny that when the servant willfully drives over the man, he is in his master's business. They hold it a departure, and a going into the servant's own independent business. It is true, he is still driving his master's wagon, and so he would be though he should use it to run away from service. It will hardly be contended, that after he has completed his escape, the master would be liable for his running over a man; and why? Because he has taken up a new and distinct object of his own, and is engaged in executing that; and has he not, to every material purpose, done the same whenever he commits a willful injury to another?

In *McManus v. Crickett*, the servant, while driving a chariot on the road, as authorized by his master, willfully drove against the plaintiff's chaise. Lord Kenyon said that the act being willful, the chariot might be considered for that purpose in the possession of the servant as his special property, and not the master's. He said: "When a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him." He puts the master's liability on the ground of negligence or unskillfulness with no purpose but the execution of his orders. Judge Reeve says it is difficult to reconcile such a doctrine with the cases which hold a sheriff liable for the willful misfeasance of his deputy. But such cases are clearly, as stated by Mr. Hammond, exceptions to the general rule for reasons of policy:

Ham. on Part. to Actions, 83, 84. The master is liable in case only; but the action against the sheriff is trespass, and lies against him for every act of his officer done *colore officii*, even the execution of process after the return day, and the seizing of the goods of a third person: *Id.*; *Ackworth v. Kempe*, 1 Doug. 40; *Parrot v. Mumford*, 2 Esp. N. P. Cas. 585. So for arresting under color of process without having any in his hands: *Smart v. Hutton*, 2 Nev. & M. 426.

The line where the master's liability shall terminate must be placed somewhere, and the acquiescence of Westminster Hall for many years in the rule we have cited as laid down by Lord Kenyon, is an evidence of the common law not to be resisted, especially as it will not be found, I imagine, to conflict with any general principle of that law. The statute, 1 R. S. 693, sec. 6, has altered the rule in respect to carriages for the conveyance of passengers. The owners are here liable, whether the injury done to another by the driver be willful or negligent. It is not contended, however, that this statute applies to the case at bar.

The objection to the judge's charge goes to the very foundation of the action against Joseph Wilcox, the father. It should have been put to the jury, that if they were satisfied from the evidence of Stephen's design to throw the plaintiff's son from the wagon, they should have acquitted his father. It is true that by the 2 R. S., 406, sec. 16, 2d ed., this act of Stephen, though willful, and formerly, therefore, the subject of an action of trespass only, is, by the statute, made the subject of an action on the case. The only consequence is that he might have been convicted and his father acquitted. But the statute, though it mitigates the consequence of misjoinder, never intended to alter the effect of the relation between master and servant. It neither adds to the right of the plaintiff nor the liability of the defendant. It goes only to the form of the remedy, by giving case in almost all instances of personal injuries redressible formerly by trespass only.

A new trial must be granted, the costs to abide the event

WILLFUL, WRONGFUL ACTS OF A SERVANT OR AGENT done without the direction of his employers, do not render the latter liable for the consequences that may follow therefrom, for such acts are done without the scope of the employment: *Richmond Turnpike Co. v. Vanderbilt*, 1 Hill, 481; *Hay v. Cohoes Co.*, 3 Barb. 48; *Morse v. Auburn & Syracuse R. R. Co.*, 10 Id. 626; *Thomson v. Six Penny Savings Bank*, 5 Bosw. 309; *Sanford v. Eighth Avenue R. R. Co.*, 7 Id. 135; *Priest v. Hudson River R. R. Co.*, 40 How. 459; S. C., 10 Abb. (N. S.) 645; *Mali v. Lord*, 39 N. Y. 383; *Whitaker v. Eighth Avenue R. R. Co.*, 51 Id. 298; *Cavanagh v. Dinmore*, 12 Hun, 468; *Isaacs v. Third Avenue R. R. Co.*, 47 N. Y. 127; *Rounds v. Delaware L. & W. R. R. Co.*, 3 Hun, 337;

S. C., 64 N. Y. 135; *Mott v. Consumers' Ice Co.*, 73 N. Y. 547; *Fraser v. Freeman*, 43 Id. 569, all citing the principal case. But where an apparent wrong is done by the servant acting under the direction of the master, both are liable: *Hill v. Caverly*, 26 Am. Dec. 635. In *Weel v. Panama R. R. Co.*, 5 Duer, 193, it was held that a passenger carrier was liable for the injuries caused to a passenger by the misconduct of the carrier's agent in managing the train confided to his care, though the misconduct resulted from a deliberate and conscious disregard of duty, upon the ground that the carrier had imposed upon him by law the duty of providing for the safe conveyance of his passengers so far as human foresight and care could secure the result, and that therefore he was bound for the due application on the part of his servants of attention, art, and skill. The case distinguished the principal case upon these grounds.

MASTER AND SERVANT MAY BE JOINED in an action brought to recover damages on account of the negligence of the servant: *Montfort v. Hughes*, 3 E. D. Sm. 594; *Phelps v. Wail*, 30 N. Y. 78.

COOPER v. KANE.

[19 WENDELL, 386.]

USAGE THAT PERSON EMPLOYED TO EXCAVATE SAND FROM LOTS to conform them to a general plan shall, in addition to the compensation stipulated, be entitled to the sand excavated, is valid and binding if it has long existed and been well known, and the parties have not made any express agreement inconsistent with it.

DEPLEVIN for sand taken by defendant from plaintiff's lot, under a contract to excavate the sand and make embankments. The judge rejected evidence offered by defendant to prove that a custom had existed for a great number of years, in the city where the work was done, and well known there, that the material excavated should belong to the excavator, unless otherwise stipulated in his contract with the owner. Verdict for plaintiff. Defendant moved for a new trial.

C. M. Jenkins, for the motion.

J. Holmes, contra.

By Court, NELSON, C. J. I am inclined to the opinion that the evidence of the custom in respect to contracts like the one out of which this action has arisen, by way of explaining it, and which was offered by the defendant for that purpose, was admissible. It did not go to vary any express or necessarily implied stipulations between the parties therein contained, but rather to establish what amounted to a complete performance agreeably to the presumed understanding of the parties.

Mr. Starkie says, 2 Stark. Ev. 258, 259: "Where parties have

not entered into any express and specific contract, a presumption nevertheless arises, that they meant to contract and to deal according to the general usage, practice, and understanding, if any such exists, in relation to the subject-matter." The same rule of evidence is also recognized by Phillips, vol. 1, 420, 421, and Lord Kenyon remarked in *Whitnel v. Grahame*, 6 T. R. 398, that evidence of usage was admissible to expound a private deed, as well as the king's charter. The right of carriers, dyers, wharfingers, etc., to a lien on the goods intrusted to them for their compensation, is frequently established by usage, independently of the contract. In *Rushforth v. Hadfield et al.*, 6 East, 519, Lord Ellenborough permitted the defendants (common carriers) to go into proof of common usage to detain the goods for a general balance, on the ground of an implied agreement arising out of it between the parties. He observed that if there be a general usage of trade to deal with common carriers in this way, all persons dealing in the trade are supposed to contract with them upon the footing of the general practice, adopting the general lien into their contract. Lawrence, J., admitted that the lien must be by contract between the parties, but observed that usage of trade was evidence of the contract, and if so long established as to afford a presumption it was commonly known, it was fair to conclude the particular parties contracted with reference to it. In *Kirkman v. Shawcross*, 6 T. R. 14, the dyers, dressers, whisters, printers, etc., of a neighborhood, held a public meeting and entered into an agreement that they would receive no more goods in the way of their trade, except on the condition that they should have a lien on them for a general balance, which was extensively published. The court held that any person who delivered goods to them after notice must be deemed to have assented to the terms prescribed; and, as we have seen, notice might be inferred from the general notoriety of the terms thus published.

Now, in this case, there is simply an agreement to excavate the earth in a certain street, and to make the necessary embankment, according to a map of the corporation, for a given compensation. Nothing is said about the surplus earth, where it is to be laid or what is to be done with it. Would it be a workman-like execution of the contract to pile it upon the adjacent bank? or may the contractor dispose of it as he sees fit, and as most convenient and profitable to himself? It appears to me, the solution of these questions may very well be referred to common

usage in such cases, if any exist; and that if it should be proved as said by Lawrence, J., "it is fair to conclude the particular parties contracted with reference to it." This usage may often have a very important influence upon the minds of the parties, as exemplified in this case; for the value of the materials, which the plaintiff has recovered, nearly equals the price of the job. If in fact the usage exists and the contract was made in reference to it, serious injustice must be the result of upholding the verdict.

New trial granted.

TOWNSEND v. GOEWY.

[19 WENDELL, 424.]

PROMISE TO TAKE AND PAY FOR STOCK in a joint-stock association may be enforced by an action at law, although the plaintiff and defendants, being members of the same association, are therefore partners.

EXPRESS PROMISE FROM ONE PARTNER TO ANOTHER in respect to contributing to the common stock or making advances thereto, may be enforced in an action at law; but an implied promise can not.

SUIT UPON A PROMISE TO PAY TO CERTAIN TRUSTEES or their successors, the amount of certain calls which may be made upon stock subscribed, must be brought in the name of the trustees to whom the promise was made, although their term of office has expired.

ASSUMPSIT. An association was formed in 1836, to build an exchange, whereby the subscribers agreed to form a joint-stock company, to buy a lot, etc., to divide the capital stock of three hundred thousand dollars into three thousand shares of one hundred dollars each. Certain persons were named as trustees. Each subscriber agreed to take the amount of stock set opposite his name, and to pay to the trustees or their successors the amounts required to be paid. The trustees were empowered to make calls from time to time. This action was for calls upon two shares of stock for which defendant had subscribed. The other facts sufficiently appear in the opinion. Plaintiffs had judgment. Defendant moved for a new trial.

J. Holmes, for the motion.

S. Stevens and M. T. Reynolds, contra.

By Court, COWEN, J. The objection taken for the first time on the argument, that this association was illegal, as being in the nature of a corporation, issuing scrips and providing for a transfer of its stock, is not well founded. The act of associating in this way is, we think, properly characterized by the first

exception taken on the trial. It constituted a partnership, valid as being formed for the purposes of a lawful and honest enterprise. Coll. on Part. 624, Am. ed., and the cases there cited.

It is, we think, clear that if this action will lie at all, it must be in the names of the plaintiffs, the original trustees to whom the promise was made. Such promise is not negotiable, and although the beneficial interest may have passed to the successors of the plaintiffs, and thence to the corporation created by the charter, no agreement contained in the articles could work a transfer of the legal right of action to others, to be pursued in their own names. They took but an equitable right as assignees, and have very properly proceeded and brought their suit in the name of the original promisees, their assignors. The promise being to pay to the trustees or their successors is but an agreement that the successors should be considered and have all the rights of assignees, without a formal assignment. The same may be said as to the directors of the incorporated company. It may be that the calls should have been made by the successors or assignees respectively, holding the beneficial interest at the time; yet in legal effect they would be the calls of the original promisees and should be so treated in pleading. No question is made in the case, however, but that the calls were made by the right persons.

The more nice question in the cause is the one first stated in the bill of exceptions, viz.: that the plaintiffs themselves being stockholders, are copartners with the defendant, and therefore can not maintain assumpsit. That the plaintiffs, or either of them, were stockholders does not appear in the bill of exceptions, though it was assumed and agreed on the argument, that some or one of them are, and a desire mutually expressed that the question should be considered by us in reference to numerous other causes pending upon the articles wherein the fact would appear. We have accordingly looked into the question. No objection was made that if the articles were of a nature to raise a partnership, but that such a connection has been formed. The parties have subscribed; all conditions in the way of the articles becoming absolutely obligatory are removed; and the declaration avers that the trustees, the agents of all, have proceeded to action in the business of the company: Coll. on Part. 626, 627. It was denied, on the argument, however, that a joint-stock company constitutes a partnership, and it was said this was so held by the late Chancellor Kent in *Livingston v. Lynch*, 4 Johns. Ch. 573. 592, of the North river steambont

company. The contrary is extremely well settled by a long and well-considered train of authority, both English and American, unbroken, as far as I have been able to find, by a single judicial opinion besides that of Chancellor Kent: Coll. on Part. 626, 651, and the cases there cited: 3 Kent Com. 26, 3d ed., and the cases there cited. Considering the question *a priori*, we do not see how there can be any serious doubt. The stockholders became jointly interested in the subject of their dealings; and their first article declares the object to be a fair return for their investments. The amount to each must of course depend on a general account of mutual profit and loss: Coll. on Part. 8, 14.

It is true, that the law will not imply a promise from one partner to another in respect to their common concerns: Coll. on Part. 143. But I am not aware of anything in this relation which precludes them from making a valid express contract *inter se*, and in respect to any branch of their partnership business if they choose. Several examples of this are given in the books. It was held that though a partner in a joint-stock company go on and perform services and expend money as an agent in its formation, he shall not have an action at law to recover it, even though the company in contemplation were never actually formed. Both plaintiff and defendant were shareholders, having subscribed the articles. The defendant was chairman. Yet Abbott, C. J., said: "If he [the defendant] had given any personal undertaking to pay the expenses incurred by the plaintiff, that might entail a liability upon him:" *Holmes v. Higgins*, 2 Dow. & Ry. 196; S. C., 1 Barn. & Cress. 74. Accordingly in *Venning v. Leckie*, 13 East, 7, the defendant having agreed with the plaintiff, his partner, to take one half share of certain flax bought by the plaintiff on joint account, and to furnish the plaintiff with one half the amount, in time for the payment thereof, in case he should require it, the K. B. held that the plaintiff might recover at law on this promise. Lord Ellenborough, C. J., said: "There are many deeds of copartnership in which the partners covenant each to advance a certain sum at first, and can it be said that no action would lie by one to enforce that covenant against another, because there are accounts between them afterwards, which require unraveling in a court of equity?" Le Blanc, J., said: "The respective sums were to be paid by each before there could be any account of profit or loss between them as partners upon the goods." In *Neale v. Turton*, 4 Bing. 149, Best, C. J., admitted that if one partner were to draw on other partners by name, and they were

individually to accept, he might recover against them, because by such an acceptance, a separate right is acknowledged to exist. And *Preston v. Strutton*, 1 Anst. 50, seems to have been decided on this principle. A specific promise or arrangement between partners, though in respect to a part of the common fund, therefore, takes it out of the general account in equity, and makes it the subject of an action at law: *Coffey v. Brian*, 10 Moo. 341; S. C., 3 Bing. 54. And it was not denied in *Davies v. Hawkins*, 3 Mau. & Sel. 488, but on the contrary seems to have been conceded, that it is competent for the parties to declare in advance by their articles of copartnership, the persons in whose name actions may be brought in behalf of the firm against a member of the firm, for goods sold to him by the partnership.

In the case at bar, we have an express promise to pay a specific amount to the plaintiffs, which was to constitute so much of the original stock upon which the business of the company was to proceed. The money subscribed never made a part of the general account of the partners; but even if it had, I find no case which holds that it might not have been taken out and made the subject of an action at law by an express agreement. The short of the agreement here is, that in consideration of the plaintiffs incurring certain duties as trustees, the defendant would pay them the sum subscribed by him, to enable them to carry on the common concern. *Jale v. Lockie*, 2 Stark. 107, will also be found a case in point. One partner agreed to furnish manuscript for a work to be printed by the other; but stopped after the print of three hundred and thirty-six pages. Assumpsit was held to lie for the breach; and Lord Ellenborough, C. J., held that the defendant had no right arbitrarily to break off from the contract. He said "The action is not brought to recover partnership profits, but for not contributing his labor towards the attainment of profits to be subsequently divided." The motion for a new trial must be denied.

New trial denied.

The doctrine of the principal case recognizing the validity of a partnership or joint-stock company for a public enterprise, with transferable shares, was approved of in *Warner v. Beers*, 23 Wend. 149.

ONE PARTNER MAY SUE ANOTHER upon a covenant to make specific advances for the purpose of launching the partnership: *Glover v. Tuck*, 24 Wend. 158; *Paine v. Thacher*, 25 Id. 452; *Robinson v. McIntosh*, 3 E. D. Sm. 231, citing the principal case.

UNDERTAKING OF THE SUBSCRIBERS TO A JOINT-STOCK UNDERTAKING to pay trustees hereafter to be elected the amount of their subscriptions, will au-

thorize the bringing of an action to recover such amounts, in the name of the trustees: *Cross v. Jackson*, 5 Hill, 480; and where a promise is to pay to the trustees of an incorporated company or their successors, the suit may be brought in the name of the trustees, although other persons may have succeeded them: *Davis v. Garr*, 6 N. Y. 134. But an undertaking to the trustees of a corporation should be enforced in the name of the corporation: *Barnes v. Perine*, 9 Barb. 207, citing the principal case.

PARTNER MAY NOT SUE ANOTHER upon an implied promise relative to the partnership transactions: *Crater v. Bininger*, 45 N. Y. 548, relying upon the principal case.

ONE PARTNER MAY SUE ANOTHER upon a covenant contained in the partnership articles: *Rondeau v. Pedesclaux*, 23 Am. Dec. 463; *Duncan v. Lyon*, 8 Id. 514.

BEEBE v. JOHNSON.

[19 WENDELL, 500.]

HOWEVER ABSURD OR IMPROBABLE A COVENANT MAY BE, an action may be maintained for a breach thereof, unless it was not within the range of possibility. And a thing will not be deemed impossible if it could by any means be accomplished, although it was beyond the power of the obligor.

COVENANT TO PERFECT A PATENT RIGHT in England and to secure to the covenantee the entire control of the provinces of Upper and Lower Canada is not necessarily impossible, for this control might be secured by an act of parliament, and the covenantor is therefore answerable for a breach of the covenant.

ACTION of covenant. Johnson had conveyed to Beebe the exclusive right to make, use, and vend in Upper and Lower Canada, a threshing machine, for which a patent had issued to one Warren, and had covenanted to perfect the patent right in England as soon as practicable, and within a reasonable space of time to secure to Beebe the entire control of the provinces of Upper and Lower Canada. Beebe brought this action averring that a reasonable time had elapsed, and that Johnson had not perfected in England, nor secured to Beebe the control of the provinces of Lower and Upper Canada, or either; and further, that Johnson and Beebe were both citizens of the United States, and a patent could not be obtained for either in England or in Canada. Verdict for plaintiff. Motion for a new trial.

W. C. Noyes, for the motion.

J. A. Spencer, contra.

By Court, NELSON, C. J. It is supposed by the counsel for the defendant that a legal impossibility prevented the fulfillment

of the covenant to perfect the patent right in England, so as to secure the monopoly of the Canadas to the plaintiff, and hence that the obligation was dispensed with, so that no action can be maintained. There are authorities which go that length: Co. Lit. 206 b; Shep. Touch. 164; 2 Co. Lit. 26; Platt on Cov. 569; but if the covenant be within the range of possibility, however absurd or improbable the idea of the execution of it may be, it will be upheld: as where one covenants it shall rain to-morrow, or that the pope shall be at Westminster on a certain day. To bring the case within the rule of dispensation, it must appear that the thing to be done can not by any means be accomplished; for, if it is only improbable, or out of the power of the obligor, it is not in law deemed impossible: 3 Com. Dig. 93; 1 Roll. Abr. 419. Now it is clear that the fulfillment in this case can not be considered an impossibility within the above exposition of the rule; because, for anything we know to the contrary, the exclusive right to make, use, and vend the machine in the Canadas, might have been secured in England by act of parliament or otherwise; at least, there is nothing in all this necessarily impossible. These provinces are a part of the British empire, and subject to the power of the parliament at home; which body might very well grant the privilege the defendant covenanted to procure. Certainly we are unable to say the government can not or would not by any means grant it. There is, then, nothing in the case to take it out of the rule in *Paradine v. Jane*, Al. 27, as expounded by Chamber, J., in *Beale v. Thompson*, 3 Bos. & Pul. 420, namely, if a party enter into an absolute contract without any qualification or exception, and receives from the party with whom he contracts the consideration of such engagement, he must abide by the contract, and either do the act or pay damages; his liability arising from his own direct and positive undertaking: 6 T. R. 750;¹ 8 Id. 267;² Lawrence, J.; 10 East, 533;³ 4 Car. & P. 295;⁴ 1 Sel. 344.

It has also been said, that the action can not be maintained, as the covenant contemplated the violation of the laws of England. We are unable to perceive the force of this objection, as the fulfillment of the covenant necessarily required the procurement of lawful authority to make and vend the machine in the Canadas. It is difficult to understand how this could be accomplished by other than lawful means. That it might be by such, we have already considered not impossible.

Again: it was said the contract was void, because it contem-

1. *Brecknock Canal Co. v. Pritchard*.
2. *Hadley v. Clarke*.

3. *Atkinson v. Ritchie*.
4. *Maryon v. Carter*.

plated a renunciation of citizenship by the defendant. Whether, if the fact was admitted, the consequence would follow, we need not stop to consider, because it is very clear that no such step is necessarily embraced in the covenant. For aught we know, the patent might be procured without such renunciation; and if it were considered unlawful to contract for expatriation, inasmuch as this agreement does not necessarily contemplate it, we would be bound to hold that the defendant assumed to procure the patent without it. But even in England, the common law rule against the expatriation of the subject is so far modified that naturalization abroad for commercial purposes is recognized, and is of course lawful: 1 Com. 677;¹ 8 T. R. 31;² 1 Bos. & Pul. 430, 440, 444;³ 2 Kent Com. 49; 1 Pet. C. C. 159.⁴ In the case of *Wilson v. Marryat*, 8 T. R. 31, and 1 Bos. & Pul. 430, it was decided that Collet, a natural-born subject of Great Britain, having become a citizen of the United States, according to our laws, was entitled to all the advantages of an American citizen under the treaty of 1794. There the defendant undertook to avoid a policy of insurance procured by the plaintiff for the benefit of Collet upon an American ship and cargo, of which he was master, on the ground that he was a British subject, and therefore the trade in which he was engaged illegal, being in violation of the privileges of the East India company, which trade was secured to American citizens by the treaty of 1794.

New trial denied.

AN ABSOLUTE CONTRACT TO DO A THING which can by any means be accomplished, will bind the obligor, though its accomplishment was beyond his power: *Van Dorn v. Young*, 13 Barb. 295; *Hitchins v. Warner*, 5 Id. 677; *Cobb v. Harmon*, 29 Id. 476; *Warfield v. Watkins*, 30 Id. 402; *Baldwin v. New York Life Ins. and Trust Co.*, 3 Bosw. 545; *O'Reily v. Mutual Life Ins. Co.*, 2 Abb. (N. S.) 173; *Kemp v. Knickerbocker Co.*, 51 How. 34; *Wheeler v. Connecticut etc. Ins. Co.*, 16 Hun, 321. Accordingly performance is not excused by inevitable accident or other contingency, though not foreseen by or within the control of the parties: *Harmony v. Bingham*, 12 N. Y. 115; *Cobb v. Harmon*, 23 Id. 151; 31 Id. 675. But where the performance of a contract of service has been interrupted by the act of God, as by the sickness of the obligor, a recovery may be had for the services actually performed: *Wolfe v. Hovee*, 20 Id. 203.

1. *McClellan v. McClellan*.
2. *Wilson v. Marryat*.

3. *Marryat v. Wilson*.
4. *United States v. Gillet*.

SICKLES v. MATHER.

[20 WENDELL, 72.]

ACCOUNT BOOKS OF A MANUFACTURER are admissible in his favor, though the entries were first made on a slate by the foreman, and were, at night, transcribed by the manufacturer.

ONE IS NOT DEEMED A CLERK, where he only delivers the goods manufactured by his employer and keeps memoranda of such delivery.

STATUTE OF LIMITATIONS DOES NOT RUN WHERE THERE ARE MUTUAL ACCOUNTS showing that an item of charge on either side accrued within six years before commencing the action.

ASSUMPSIT, commenced July 19, 1836, for goods sold and delivered. Plea, general issue and statute of limitations. Plaintiff was a manufacturer of ink. His charges were for ink sold at nine different days between January 12, 1830, and February 18, 1831, aggregating two hundred and twenty-four dollars and fifty-seven cents. Four only of the charges were within six years prior to commencing the action. The defendant had a set-off which was allowed by plaintiff, two items of which accrued in March, 1830. One of the principal questions was concerning the admissibility of plaintiff's books of account. The plaintiff's foreman, James Lightbody, being called as a witness, testified, that he had been in plaintiff's service for ten years, and during that time had delivered all the ink sold; that he had at different times furnished ink to defendant, and, in particular, remembered twelve kegs of ink furnished to go on board a vessel; that he could not state the times at which any of the ink was delivered, though he thought he delivered ink to defendant in 1830 and 1831; that plaintiff kept no clerk; that witness made on a slate memoranda of all ink delivered; that from the slate the plaintiff made the charges in the day-book; sometimes the charges were thus transcribed every day, and sometimes not until two or three days after their entry on the slate; that the witness never made an entry in plaintiff's books. Two witnesses testified to having extensive business with plaintiff and always finding his books honest and correct. The books were then offered and received in evidence, against the defendant's objections: 1. That Lightbody was shown to be a clerk and the books were therefore not admissible; and, 2. That they were inadmissible, because transcribed from a slate. The case was before referees, who reported in favor of plaintiff. The report being confirmed, and judgment given for plaintiff, the defendant prosecuted a writ of error.

R. Lockwood, for the plaintiff in error.

H. Holden, *contra*.

By Court, COWEN, J. It is not denied that if there were mutual accounts current, and any one item on either side was proved to have arisen within six years next before the suit brought, this will draw after it both accounts, and take the case out of the statute of limitations. Thus the inquiry here brings us, in some measure, down to the admissibility of the books of the plaintiff below. They contain dates within the six years; and if competent evidence, they are so as well in respect to the date of the sales, as of the sales themselves. It is to be noted, however, that both Lightbody and the defendant's witness, Hall, gave evidence upon which the referees might well have been satisfied, that ink was delivered within the six years, so that we are not driven for time to the books alone.

The books were, however, essential to the main question in the cause; for there was no other adequate proof of the plaintiff's account. Were they admissible? It is said, first, that the plaintiff had a clerk; and if so, they were clearly inadmissible according to *Vosburgh v. Thayer*, 12 Johns. 462. Lightbody calls himself foreman, and says he never in his life made an entry in the plaintiff's books. This certainly does not look like his being a clerk. The object of the limitation doubtless was to withhold secondary evidence, with which the books alone must certainly be classed, until it shall appear that, at least, the party was without a regular clerk, whose business it is to notice the sales and make entries as they occur in the journal. He is then the only admissible witness. At any rate, this is so as to all the entries, unless it appear affirmatively that some of them were in fact not made by him: *McAllister v. Reab*, 4 Wend. 483. Several cases in states where the party's suppletory oath is allowed, exclude books as evidence of transactions, when it appears they were in fact known to third persons. Such a precaution would be of very little utility in this state, where the party is not sworn, and it is, therefore, commonly impossible to learn that others could testify. Lightbody was not in any sense a clerk for the purpose of verifying the books. A clerk can connect them with the sales (many of which he usually makes himself), and his original entries (to the general accuracy of which he can make oath) become themselves evidence of what he may in fact have forgotten: *Merrill v. The Rhaca and Oswego Railroad Co.*, 16 Wend. 596-600 [30 Am. Dec. 130], and cases there cited. It would

clearly be going beyond the meaning of the qualification in *Vosburgh v. Thayer*, to say that a man about a factory who attends no farther to sales than the mere delivery of goods, and noting the fact for a temporary purpose upon a slate, should be esteemed the only competent witness to establish all the sales and entries of his principal.

Then as to the manner in which these entries were made. We have, with what degree of wisdom, time must determine, held that books of original entries made by the party, shall be evidence in his favor, under certain qualifications; and this whether he be a merchant, or engaged in any other business. We do not require nor allow his own oath, a practice I believe peculiar to this state, and that of New Jersey. Even if this be a hazardous species of evidence, as every one, I think, must allow, yet I am at a loss to perceive that the adoption of an exception which shall exclude entries from a slate, is of any importance towards diminishing the danger. In those states where the suppletory oath comes in, I know there are several cases for and against the reception of entries thus made. If there be any degree of protection against abuse in such a restriction, it has there, at least, the merit of being a more practicable one; for the party can be interrogated as to the manner of his entry. With us we have ordinarily no means of showing this, and the case must be one of a thousand in which it is disclosed. The witness who could speak to such a fact must in general, like the one in this case, be a third person who has made the slate memoranda himself. After all, perhaps the better considered cases are those that allow books in evidence which are made up from such memoranda, even where the party is a witness. So long as books are allowed at all, it is not very easy to perceive what great degree of additional accuracy or honesty we can give to them by forbidding the party to use a slate during the day, and transcribing from that into his book at night. It is a very common practice with men in all kinds of mechanical and other business conducted under circumstances which render the immediate use of pen, ink, and paper inconvenient; and where such was found to be the ordinary course of the party, his books were received for that reason: *Faxon v. Hollis*, 13 Mass. 427; though where a journeyman was in the habit of making the entries on a slate, whence they were copied by his master after a long time, the manner was held exceptionable and the books rejected: *Kessler v. McConachy*, 1 Rawle, 441. Where one partner marked a sale of butcher's meat with chalk on his cart, and the other transcribed it on the return

of the cart, the book was received on their oaths: *Smith v. Sanford*, 12 Pick. 139. So where a butcher's servant carrying out meat, marked the sales in pencil, which his master transcribed on his return: *Ingraham v. Bockins*,¹ 9 Serg. & R. 285. And see all the kindred cases in Pennsylvania, cited in *Forsythe v. Norcross*, 5 Watts, 332. Not to pursue the cases farther, it seems to me that the benefit to be derived from the qualification contended for by the counsel for the plaintiff in error, would not compensate for the great quantity of evidence which it would cut off even if we had the means of reaching it by testimony.

It is not denied by counsel that the plaintiff below was entitled to have his books received in evidence, under the limitations prescribed in *Vosburgh v. Thayer*; and we think he brought himself within that case. The rule itself which receives the party's books, even with his oath, seems to be regarded as of questionable policy, if we are to judge from the language of the courts and the course of decision in several states where it prevails. In some they appear disposed to load it with a multitude of restrictions as to the kind of business in respect to which books are to be received, and the manner in which they are kept, and the probability that better evidence may be had, etc. The rule is undoubtedly a departure from the common law, and may be a dangerous one; but that is rather an argument for repudiating it altogether than attempting to mitigate its virulence by feeble palliatives.

The judgment of the court below is affirmed.

BOOKS OF ACCOUNT are in themselves evidence, without the suppletory oath of the party: *Larue v. Rowland*, 7 Barb. 110. The evidence, however, afforded by them is of very low degree: *Davison v. Powell*, 16 How. Pr. 470; and it is held by some of the subsequent cases apparently relying upon the principal case, that the books are inadmissible unless previous proof is made that some of the articles or services charged in the account have been actually delivered or rendered: *Conklin v. Stamler*, 2 Hilt. 424; S. C., 8 Abb. 306; S. C., 17 How. 400; *Morrill v. Whitehead*, 4 E. D. Sm. 241. The rule admitting these books applies to all books of account and not merely to those of a merchant; thus the books of a physician may be used: *Foster v. Coleman*, 1 E. D. Sm. 89, citing the principal case.

In *Tomlinson v. Borst*, 30 Barb. 44, it was held that the principal case did not advance the doctrine that books of account were inadmissible if evidence of the transactions they referred to could be proved in any other manner, as by the oath of third persons who were cognizant thereof. The cases in the American decisions relative to this subject are collected in the note to *Merrill v. Ithaca and Owego R. R. Co.*, 30 Am. Dec. 130.

WHERE THE ITEMS OF A BOOK OF ACCOUNT ARE COPIED from the mem-

1. *Ingraham v. Bockins*; 11 Am. Dec. 730.

granda of a sawyer (the books being those of the owner of a sawmill) the book is nevertheless one of original entries: *Davison v. Powell*, 16 How. Pr. 469. So where the entries were transcribed from a slate, upon which the work done each day in a foundry was entered by those doing it: *Stroud v. Tilton*, 3 Keyes, 141; to the same effect, *Krom v. Levy*, 47 How. 102; S. C., 3 N. Y. S. C. 706, relying upon the principal case. But where entries on a slate were not transcribed for the next four or five days, the book was held not to be admissible as one of original entries: *Forsythe v. Norcross*, 30 Am. Dec. 334 and note.

THE CAUSE OF ACTION ON MUTUAL ACCOUNTS ACCRUES from the time of the last item proved on either side: *Ross v. Ross*, 6 Hun, 81; *Ogden v. Astor*, 4 Sandf. 329, relying upon the principal case.

In *Coggswell v. Doliver*, 3 Am. Dec. 45, it was held that if any one item of an account was within the period of limitation, it would carry with it the other items which otherwise would have been barred by the statute. See also note to that case. But a new item to take the whole of an account out of the statute of limitations must be a part of, or connected with, such account; a mere opposing demand, wholly unconnected with the account, can not have that effect: *Green v. Caldcleugh*, 28 Am. Dec. 567.

SMITH v. WEED.

[30 WENDELL, 184.]

RELEASE OF AN ATTACHMENT LIEN IS A GOOD CONSIDERATION for a promise made by a third person to pay the debt for which the attachment was levied.

ASSUMPSIT. Plaintiff attached certain stone under a writ against J. S. Joslin. The defendant then agreed that if plaintiff would release the attachment, defendant would pay the debt of Joslin for which the attachment was levied, provided that the stone should be Joslin's property. The plaintiff accepted the agreement and released the attachment. The stone was proved to be Joslin's. Verdict for plaintiff under instructions of the court. Motion made by defendant for new trial.

C. Tracy, for the motion.

J. A. Spencer, contra.

By Court, NELSON, C. J. The attachment appears to have been regularly issued under the provisions of 2 R. S. 230, sec. 26 *et seq.*, as amended in respect to the preliminary proof by the act of 1831, to abolish imprisonment for debt: Statutes, sess. of 1831, p. 404, sec. 35, for a sum not exceeding one hundred dollars, upon the ground that the defendant in that process (Joslin) had absconded from the county with the intent to defraud his creditors. The authority given to a justice by the revised statutes

to issue an attachment, was not abridged by the thirty-fourth section of the act of 1831; but on the contrary, was extended to other cases, viz., the fraudulent removal, assignment, or secretion of property, limiting, however, the amount in those cases to fifty dollars. The revised statutes are left untouched except in respect to the affidavit of the facts and circumstances on which the application is made, which by the thirty-fifth section may now be made by the plaintiff himself, instead of being made by two disinterested witnesses.

The judge was clearly right in ruling that the stone attached belonged to Joslin, the defendant in the process; that the lien was valid, and that the release thereof constituted a good consideration for the undertaking of the defendant to pay the debt due to the plaintiff: 5 Taunt. 450;¹ 2 East, 332;² 4 Taunt. 117;³ 2 Saund. on Pl. and Ev. 547. Whether the agreement was intended to embrace the whole demand due, one hundred and thirty-one dollars, or only one hundred dollars, the extent of the lien, is matter of construction. The judge at the circuit took the former view of it from the language used by the witnesses, and I am inclined to think he was correct. The testimony of one of the witnesses is, that the defendant promised to pay the debt of Joslin, if the plaintiff would release the attachment; this may fairly include the whole, as the amount of the debt must have been well known at the time.

New trial denied.

RELEASE OF LEVY OF EXECUTION IS A VALID CONSIDERATION for the promise of a third person to pay the judgment debt: *Stern v. Drinker*, 2 E. D. Sm. 403. See, also, dissenting opinion of Bacon, J., in *Mallory v. Gillett*, 21 N. Y. 446. The principle is, that a consideration may consist indifferently of a benefit to the promisor, or some trouble or detriment imposed upon the promisee: *Union Bank v. Coster*, 3 Comst. 209; S. C., 1 Sandf. 567; *Homer v. Guardian etc. Ins. Co.*, 67 N. Y. 483, relying upon the principal case. That an injury to the promisee or benefit to the promisor are equally valid considerations to support the promise, see *Hind v. Holdship*, 26 Am. Dec. 107 and note.

AFFIDAVIT IS SUFFICIENT TO GROUND AN ATTACHMENT, though the applicant swears only to his belief as to the intent to defraud: *Fulton v. Heaton*, 1 Barb. 555; *Furman v. Walter*, 13 How. 355. See also *Greene v. Gonzales*, 3 Daly, 413; *Bates v. Relyea*, 23 Wend. 337, citing the principal case.

1. *Browning v. Stallard*.

2. *Castling v. Aubert*.

3. *Barrell v. Truesell*.

SMITH v. JANES.

[20 WENDELL, 192.]

CHECKS ARE GOVERNED, in several particulars, by the rules applicable to inland bills of exchange payable on demand, or at a specified time after sight.

INDORSER OF A CHECK is not liable unless due diligence has been used in presenting it and giving notice of the presentment and dishonor.

PRESENTMENT OF A CHECK FOR PAYMENT should be made on the day it is received, or on the next day, if the parties reside in the same place; when payment is to be made at a different place from that where the check is negotiated, it should be forwarded by mail on the same or the next succeeding day for presentment.

IN PRESENTING A CHECK no greater diligence is required than in presenting bills of exchange for payment.

LACHES IN PRESENTING A CHECK WILL NOT BE PRESUMED, in an action by a second indorsee; if there was negligence on the part of any prior holder the defendant must prove it, if he wishes to exonerate himself thereby.

SPACE OF TIME IN WHICH A CHECK MAY BE KEPT IN CIRCULATION before presentment, without discharging the parties, is not settled. Several cases in this subject are here adverted to. Certainly the fact that the check was in circulation four or five days before it was sent to be presented will not release the indorsees.

CERTIFICATE OF NOTARY that he "deposited in the post-office notices of the foregoing protest, for Horace Janes, New York," is proof that the notice was directed to Horace Janes.

ASSUMPSIT by plaintiff, as indorsee, against the defendant, as indorser of two checks. The first was drawn July 17, 1836, by B. Rathbun, on the Commercial Bank of Buffalo, payable to order of defendant and by him indorsed. It was indorsed and negotiated to plaintiff in New York city by Wood & Bogert, July 27 or 28. Plaintiff, on the same day, indorsed it to F. H. Pepoon. It was presented and protested August 4, 1836. No account was given of the check between July 17 and 27, nor between the last date and its presentment. The time required for the mail to reach Buffalo from New York was three days. The second check was for three thousand dollars. The facts regarding it varied from those connected with the other check in these particulars only: 1. This check was dated July 28, 1836; 2. It was negotiated by Wood & Bogert on July 29 or 30; 3. It was indorsed to Pepoon the same day; 4. It was presented and protested August 9, 1836. The other facts sufficiently appear in the opinion. Verdict for plaintiff. Defendant moves for a new trial.

J. A. Spencer, for the motion.

R. Lockwood, contra.

By Court, BRONSON, J. In several particulars, checks are governed by the same rules that prevail in relation to inland bills of exchange, payable either on demand, or at a given number of days after sight. The holder can recover against the indorser only when he has used due diligence in presenting the check, and giving notice of the demand and non-payment by the bank. When the parties all reside in the same place, the holder should present the check on the day it is received, or on the following day; and when payable at a different place from that in which it is negotiated, the check should be forwarded by mail on the same or the next succeeding day for presentment. It has been said that greater diligence is necessary in presenting checks for payment, than is required in relation to bills of exchange: *Gough v. Staats*, 13 Wend. 549. But I can see no good reason for making such a distinction. The fact that one instrument is drawn upon a bank, and the other upon an individual, can make no difference in principle concerning the duty of the holder; what will be due diligence in the one case will, I think, be due diligence in the other: *Mohawk Bank v. Broderick*, Id. 133 [29 Am. Dec. 192].

As the questions are substantially the same in relation to both checks, I shall only notice that for two thousand dollars, dated July 17, 1836. If this check was negotiated to Wood & Bogert on the day of its date, and retained by them ten or eleven days until it was passed to the plaintiff, the defendant would be discharged; but it does not appear when, or to whom the check was first negotiated. It may have been transferred by the payee to Wood & Bogert, on the same day they sold it to the plaintiff, or if negotiated before that time it may have passed through several hands before it was taken by Wood & Bogert. This is not a case where we can presume laches. The defendant is the payee of the check, and must know when and to whom it was first transferred; and the burden lies on him of making out a default in some holder of the check before it came to the hands of the plaintiff.

The course of the mail between New York and Buffalo, was only three days, and as seven or eight days elapsed between the time the plaintiff took the paper, and the day it was presented to the bank for payment, the plaintiff would be chargeable with a want of due diligence, if he had not put the check in circulation. But he sold it to Pepoon on the same day it was received, and there is no proof of negligence in Pepoon or any subsequent holder of the paper. If the defendant intended to rely on any

default after the check passed from the plaintiff, the burden of making out the case lay upon him. We can not presume laches, especially in a case where the paper was in circulation for so short a period. How long a bill or check, payable on demand, or at a given number of days after sight, may be kept in circulation before presentment, without discharging some of the parties, is not a settled question: Chit. on Bills, 276, ed. of 1826. It depends in a great degree on the circumstances of each particular case. In *Robinson v. Ames*, 20 Johns. 146 [11 Am. Dec. 259], the bill was drawn in Georgia on merchants residing in New York, and although seventy-five days elapsed before the presentment, it was held that the drawers were not discharged. In *Gowan v. Jackson*, 20 Johns. 176, the bill was drawn in Antigua, on merchants residing in London, and having been put in circulation, it was held that the drawer was not discharged, although six months had elapsed before the presentment. In *Aymar v. Beers*, 7 Cow. 705 [17 Am. Dec. 538], the bill was drawn in New York on a house in Richmond, Va., at three days' sight, and it was held that the drawer was not discharged by a delay of twenty-nine days in presenting the bill for acceptance. The bill had not been put in circulation, but there were other special circumstances to show that the payee was not chargeable with negligence. In the case at bar, three days were necessary for the transmission of the check from New York to Buffalo, and it could not have been in circulation, after it passed from the plaintiff, more than four or five days before it was presented at the bank for payment. There is no authority for imputing laches on such a state of facts, and the judge was right in overruling the objection.

The official certificate of a notary is, in certain cases, declared presumptive evidence of the facts which it contains: Laws of 1833, p. 395, sec. 8. It is not denied that the certificate was properly in evidence, but it is said that the facts stated by the notary do not prove due notice. Several objections to the sufficiency of the proof were mentioned on the argument, but this is a bill of exceptions, and we can not look beyond the particular objection taken on the trial. The defendant resided in New York, and payment was demanded at Buffalo. The notary certifies that on the same day he "deposited in the post-office notices of the foregoing protest, for—Horace Janes, New York." The objection on the trial was, that the notary had not certified that the notice was directed to the defendant. When a public officer, in the course of his official duty, certifies that he deposited a

notice in the post-office for a particular person, it is, I think, but a reasonable intendment that the notice was directed to that person. We can not presume the contrary, without imputing a gross dereliction of duty to the officer.

New trial denied.

INDORSER OF A CHECK is entitled to the same degree of diligence in the matter of its presentment, as would be required to bind the indorser of a bill of exchange: *Harbeck v. Craft*, 4 Duer, 129, and see dissenting opinion in *Merritt v. Todd*, 23 N. Y. 41, relying upon the principal case.

PRESENTMENT OF A CHECK payable on demand is in time if made on the day after it is received: *Burkhalter v. Second Nat. Bank*, 42 N. Y. 541; S. C., 40 How. 326. Where a check is made, bearing date eleven days later than its execution, and is put into circulation, the holder who receives it may carry it to his place of residence, and retain it until the time of its maturity, and then forward it for presentment by mail: *Middletown Bank v. Morris*, 28 Barb. 617, citing principal case. The questions relative to the presentment of checks are discussed in *Mohawk Bank v. Broderick*, 27 Am. Dec. 192.

SALTER v. BURT.

[20 WENDELL, 205.]

POSTDATED CHECK IS PAYABLE ON THE DAY IT BEARS DATE, without grace.

SUNDAY.—If a NOTE WHICH FALLS DUE ON SUNDAY has no days of grace, demand for payment can not be lawfully made until the following Monday, and if made before is void. If, however, the note is entitled to three days of grace and the last of these falls on Sunday, the note is payable, and demand for payment may lawfully be made on the Saturday preceding.

SUNDAY.—IN COMPUTING THE TIME ALLOWED TO DO AN ACT, intervening Sundays are included; but if the day of performance falls on Sunday, it is not counted, and the party is entitled to perform the act on the Monday following.

ACTION on a check, drawn August 9, but dated August 21, 1836. This last date fell on Sunday. Presentment for payment was made and notice of dishonor given Saturday, the twentieth. The declaration showing these facts was demurred to.

C. A. Mann, for the demurrer.

J. A. Spencer, contra.

By Court, BRONSON, J. This check, having been postdated, was payable on the day of its date, without any days of grace: *Mohawk Bank v. Broderick*, 10 Wend. 804 [27 Am. Dec. 192]; 13 Id. 133. It fell due on Sunday, and the question is whether the demand of payment was well made on the previous Saturday, or whether it should have been made on the following Monday. When

days of grace are allowable on a bill or note, and the third day falls on Sunday, the bill or note is payable on the previous Saturday. The same custom of merchants which, as a general rule, allows three days of grace to the debtor, has limited that indulgence to two days in those cases where the third is not a day for the transaction of business. But when there are no days of grace, and the time for payment or performance specified in the contract falls on Sunday, the debtor may, I think, discharge his obligation on the following Monday. This question was very fully considered in *Avery v. Stewart*, 2 Conn. 69 [7 Am. Dec. 240], which was an action on a note, not negotiable, which fell due on Sunday; and the court held that a tender on Monday was a good bar to the action. I agree to the doctrine laid down by Gould, J., that Sunday can not, for the purpose of performing a contract, be regarded as a day in law, and should, as to that purpose, be considered as stricken from the calendar. In computing the time mentioned in a contract for the doing of an act, intervening Sundays are to be counted, but when the day for performance falls on Sunday, it is not to be taken into the computation. The check was presented before it became payable, and the demand and notice were consequently insufficient to charge the indorser.

Judgment for defendant.

A CHECK OR NOTE FALLING DUE ON SUNDAY, is payable on the following day, if it is not of the kind that has days of grace: *Campbell v. International Life Assn. Co. of London*, 4 Bosw. 318; *Lindennuller v. People*, 33 Barb. 569; *Commercial Bank of Ky. v. Varnum*, 49 N. Y. 279. But if days of grace are allowed and the last day of grace fall on a Sunday, the instrument is payable on the preceding Saturday: *West v. Lee*, 50 How. 314; *Lindennuller v. People*, *supra*, relying upon the principal case. The rule laid down in *Sanders v. Ochiltree*, 30 Am. Dec. 551, is different; it is there held that a note that falls due on a Sunday is payable on the preceding Saturday, totally irrespective of the question of days of grace, and subject only to the qualification that a note payable one day after date and executed on a Saturday is not due before the following Monday. This doctrine, however, is opposed to the general current of authority. See note to that case.

Contract, the day of performance of which falls on a Sunday, is deferred to the next day: *Brooklyn Oil Refinery Co. v. Brown*, 38 How. 449; *Keating v. Serrell*, 5 Daly, 282. But if the contract is to be performed by a certain day which is a Sunday, the time of performance is not extended: *Bunge v. Koop*, 5 Rob. 14; *Brooklyn Oil Refinery Co. v. Brown*, *supra*, relying upon the principal case.

POSTDATED CHECKS ARE NOT ENTITLED TO GRACE: *Bowen v. Newell*, 2 Duer, 598. Bank checks are due as soon as presented: *Trash v. Martin*, 1 E. D. Sm. 511, citing the principal case.

CERTIFICATE OF A NOTARY stating that "due notice" has been served on the indorser is sufficient, without setting forth the contents of the notice: *Seneca Co. Bank v. Nease*, 3 N. Y. 445, citing principal case.

BENNETT v. LOCKWOOD AND CARTER.

[20 WENDELL, 223.]

DAMAGES ARE RECOVERABLE FOR TIME AND MONEY SPENT in searching for property wrongfully taken.

CASE against Bennett, for taking a horse and wagon, and also for special damages for time and money spent in searching for the property. The facts sufficiently appear from the opinion.

The court charged and the jury found in favor of plaintiffs. Defendant sued out a writ of error.

O. H. Whitney, for the plaintiff in error.

A. P. Grant and W. F. Allen, contra.

By Court, NELSON, C. J. The defendant took the horse and wagon of the plaintiffs wrongfully, and used them, by reason of which taking the plaintiffs were induced to believe that the person to whom they had hired it temporarily had absconded, and therefore they went in pursuit of their property, and expended time and money. It is insisted for the plaintiff in error, that the common pleas erred in allowing the plaintiffs to recover for the time spent and expenses incurred, on the ground that the damages thus claimed were not the natural or necessary consequence of the wrongful taking. Admitting the counsel for the plaintiff to be right in this proposition, it is no objection to the recovery if the damages were proximate and not too remote, and were claimed in the declaration: 1 Chit. 333; 1 Saund. Pl. and Ev. 136. Here the damages were duly claimed; they occurred in the use of reasonable means on the part of the plaintiffs to repossess themselves of their property, and were occasioned by the wrongful act of the defendant.

Judgment affirmed.

DAMAGES MAY BE RECOVERED FOR THE LOSS OF TIME INCURRED, and for the payments of money made, in the search of property which has been unlawfully taken: *McDonald v. North*, 47 Barb. 532; *Miller v. Garling*, 12 How. 204. Proximate damages have also been held to include, in cases of wrongful taking, the expenses which were necessary to replace the property. Thus where plaintiff's horse was wrongfully taken, he was allowed to recover the hire of another horse: *Clinton v. Townsend*, 1 N. Y. S. C. 332; S. C., 46 How. Pr. 48. And where a horse, belonging to an expressman, has been injured, through defendant's negligence, recovery may be had for the loss of the earnings thereby occasioned, during a reasonable time which the law allows the expressman to replace the horse: *Albert v. Bleecker Street etc. R. R. Co.*, 2 Daly, 393.

But the expenses of an unsuccessful suit that has been instituted against

one, to whom defendant had delivered property unlawfully converted by him, can not be recovered: *Wilson v. Mathews*, 24 Barb. 299, distinguishing the principal case. The principal case is also cited in *Wibert v. New York and Erie R. R. Co.*, 19 Barb. 48.

GROVER v. GOULD AND FRINK.

[20 WENDELL, 227.]

TO GIVE AN INFERIOR COURT JURISDICTION OVER AN ACTION OF ASSUMPSIT, the consideration as well as the promise must be alleged to be within the jurisdiction of the court. An omission of this allegation is fatal even after verdict. But an allegation that the defendant at, etc., and within the jurisdiction of this court, was indebted to plaintiff for goods, wares, and merchandise by plaintiff sold and delivered, and then and there promised, etc., sufficiently shows that the consideration as well as the promise arose within the jurisdiction of the court.

ASSUMPSIT against Grover, brought in the mayor's court of the city of Rochester. The material facts are stated in the opinion. Plaintiff recovered judgment. Defendant sued out a writ of error.

E. Darwin Smith, for the plaintiff in error.

C. M. Lee, contra.

By Court, NELSON, C. J. This being an action brought before an inferior court, there can be no doubt of the rule, that in all such cases it is necessary that every part of that which constitutes the gist and substance, in other words, the cause of the action, should appear upon the record to be within the jurisdiction of the court; therefore, as it is said, the consideration as well as the promise itself, must be laid in the declaration to be within the jurisdiction of the court, and the omission is error even after verdict: *Stanman v. Davis*, 1 Salk. 404,¹ and note; 2 Ld. Raym. 795;² S. C., 2 Wils. 16;³ 1 T. R. 151;⁴ *Peacock v. Bell and Kendall*, 1 Saund. 74 and note 1.

Here the plaintiffs have averred that the defendant on the first of December, etc., at the first ward in the city of Rochester, etc., and within the jurisdiction of this court, was indebted to the plaintiff, etc., for divers goods, wares, and merchandises by the said plaintiff before that time sold and delivered to the said defendant, etc., and that he then and there promised, etc. I admit that the sale and delivery of the goods constitute the gist of the action, the promise arising by operation of law; and yet, notwithstanding the literal strictness of some of the cases which

1. *Stannion v. Davis*.

2. *Id.*

3. *Roe v. Hicks*.

4. *Tresor v. Hall*.

has been a subject of regret, I can not but think that it appears with reasonable certainty that the sale and delivery took place within the jurisdiction of the court. The declaration would probably have been bad on special demurrer, but after verdict, it should be deemed sufficiently explicit: the place to be regarded as relating to the sale and delivery as well as to the indebtedness. It is neither a violation of grammar nor of sound construction of the language in the connection used, so to understand it. An ambiguous expression in a declaration is cured by verdict, and must afterwards be taken to have been used in that sense which will sustain the verdict: 1 Barn. & Cress. 296.¹ Our statute of amendments is somewhat broader than the English, and many technicalities necessarily regarded in England are here to be overlooked; though I admit, that if we were bound to construe the declaration, as having omitted altogether the averment of jurisdiction, the defect would not be cured by the verdict. But the statute affords very strong evidence of the liberal spirit with which pleadings are to be regarded by the courts after trial.

Judgment affirmed.

**ATKINS AND WIFE v. KINNAN. ATKINS AND WIFE
AND TUNISON v. BOSTWICK. SAME v. CAYWOOD.**

[20 WENDELL, 241.]

PETITION AND ACCOUNT FOR SALE OF REAL ESTATE presented to a surrogate, if sufficient in form, confer jurisdiction; and, in a collateral proceeding, the court can not inquire whether the petition and account were false.

THE DIFFERENCE BETWEEN ERROR AND WANT OF JURISDICTION is this: for the former, proceedings can not be collaterally avoided, while for the latter, they are everywhere void.

THE ACCOUNT OF DEBTS REQUIRED TO BE GIVEN THE SURROGATE, is sufficient to vest him with jurisdiction to order a sale, if any one of the several items of debt be sufficiently stated.

CONVEYANCE BY AN EXECUTOR, FAILING TO SET FORTH AT LARGE the order under which it was made, when the statute requires it to be so set forth, is invalid.

EJECTMENT for several tracts of land. The plaintiffs were entitled to recover unless the defendants had obtained title through certain surrogate sales. The objections to these sales sufficiently appear from the opinion. Defendants had judgments and plaintiffs moved for new trials.

A. Gibbs, for the motions.

Ben Johnson, contra.

1. *Huntingtower v. Gardiner*, 1 Barn. & Cress. 297.

By Court, COWEN, J. (After disposing of some minor questions, the judge proceeded as follows.) Thus these verdicts are brought to depend exclusively on the form of the proceedings before the surrogate, and the deeds from the executor. If these were on their face valid, as being a compliance with the statute, 1 R. L. of 1801, 323, 324, secs. 20 and 21, the title of all the defendants was perfect, under the finding of the jury upon the question of domicile. If not, the plaintiffs are entitled to recover, unless there be other impediments which can have no operation in disposing of these cases.

By section 20 of the statutes above referred to, the executor was bound to make a just and true account of the personal estate and debts, as far as he could discover the same, and deliver it, with a proper petition, to the surrogate, who might, on due inquiry, order a sale of real estate, if he should find the personal estate insufficient to pay the debts. It was mentioned in argument that the account, when presented, was not sworn to by the executor; but no such objection being made on the trial, it can not be entertained here.

It is clear that we can not, in this collateral proceeding, inquire whether, in fact, there were any debts due over and above the personal estate. The petition and account of the debts and estate were the papers to confer jurisdiction under the statute: *Ford v. Walsworth*, 15 Wend. 449; and if they were sufficient, as showing a balance against the estate in proper form, the adjudication of the surrogate that a balance was due, followed by his order of sale, must be received as conclusive: *Jackson ex dem. Jenkins v. Robinson*, 4 Id. 436. Such a proceeding can not, ordinarily, be impeached, in a collateral proceeding, even for fraud, where all persons interested are properly made parties according to the statute. The doctrine is quite familiar in examining the proceedings of all courts: *Per* Sergeant, J., in *Wimmer's appeal*, 1 Whart. 105, 106; *McFadden v. Geddis*, 17 Serg. & R. 336, and cases there cited. The difference lies between a want of jurisdiction and error. In the former case, the whole is *coram non judice* and void: in the latter, the proceeding can not be impugned in a collateral action, even though it be erroneous on its face: *Jackson ex dem. McFail v. Crawford*, 12 Wend. 533; and even though it relate to a fact which in a former stage of the proceeding might have been essential to confer jurisdiction: *Per* Shaw, C. J., in *Betts v. Bagley*, 12 Pick. 582. It is examinable only on a direct proceeding, as by an appeal or a proceeding in

nature of an appeal; and where there is no remedy of that kind, it concludes forever.

The whole case is then narrowed down to two of the points made by the plaintiffs' counsel: 1. Whether the account of debts and personal property filed with the surrogate were sufficient to give him jurisdiction; and, 2. Whether the deed, in omitting to state his order at large, is therefore void.

The first objection was leveled particularly against the account of debts due from the estate. In all three of the causes, it was said, neither person nor amount, nor consideration, are mentioned as to some of the debts, and in the action against Caywood, it was added, what in fact is equally applicable to all of them, that some of the debts arose after the testator's death. The statute 1 R. L. of 1801, 323, sec. 20, should doubtless be so construed as to facilitate the detection of fraud in simulating debts, thus wrongfully disinherit heirs or divesting the claims of devisees. In that view, it may be too strong to say that a lumping of the debts throughout, as is done here in respect to part, would be a compliance with the act. It would not much resemble an account in any sense of the word. But it is not necessary to say definitively, whether that would be a fatal defect, nor whether funeral expenses are a debt of the testator within the meaning of the act; for there can be no doubt that the account of the debt of five hundred dollars stated to have been due to Longcon & Caywood of Ulysses, by way of penalty in a lease, was sufficiently specific. This it is said must of necessity be more than the real debt, because it is stated as a penalty. That is not so. We ought to intend rather that the damages for the breach equaled the penalty, or that this was in the nature of liquidated damages. Again, if the whole penalty were wrongfully allowed, the objection does not relate to jurisdiction. The court having power to award that any balance was due from the estate, excess was error only, and must here, notwithstanding, be taken for the true sum. That item will, of itself, sustain the proceedings, even if we reject all the others as nullities.

2. In respect to the form of the deed; the statute, 1 R. L. by Kent and Radcliff, 1801, 324, sec. 21, requires that the sale shall be made and conveyances for the same executed by the executors, etc., applying for the order; "and the conveyances for the same shall set forth such order at large; and shall be valid, etc., against the heirs and devisees of such testator or intestate, and all claiming by, from, or under them."

In strict prudence, even at common law, and independent of

any statutory injunction, such a deed should recite the authority under which the executor acted; for, though such a recital would not, as against persons other than the grantor or those claiming under him, be evidence of the order, it would, even in respect to strangers, be proof to connect the grantor with the order, as a cotemporaneous declaration that the agent was acting as such, and not in his own right. The omission of such a recital would put the party claiming under the deed, to show the fact by proof *aliunde*, as he must in all cases against the heir or devisee prove the original order. Probably there would not, in general, be much difficulty in establishing the connection which would be intended, on its appearing that the grantor had no pretense of title in his own right, for the law refers the intention to the lawful, rather than the wrongful capacity: *Per Holt, C. J., in Parker v. Kett*, 1 Sulk. 95, and 1 Ld. Raym. 658. Yet all this is mainly for the benefit of the grantee. What advantage the heir or devisee or creditors can derive from the recital in a deed which is to go into the hands of an adverse claimant, the recital too of an order which is matter of record, it is perhaps difficult to conceive. The deeds refer to the order, and one of them mentions its date in such a way, that any one can find it in all its relations and dependencies at the fountain-head; and if we could feel ourselves warranted in the belief that no benefit whatever was intended by the recital to any except the grantee and those claiming under him, I, for one, should then have no difficulty in saying, that it is not for the plaintiffs to raise the objection. *Quilibet potest renunciare juri pro se introducto*: 2 Inst. 183.

But the matter has not been thus regarded by the legislature. It is true, as was said on the argument, that there is no express adjudication in this court, declaring the want of such a recital fatal to the conveyance. The farthest we have gone is in *Rea v. McEachron*, 13 Wend. 465 [28 Am. Dec. 471], which avoids it for actual want of the surrogate's order of confirmation. A late statute has, however, gone farther: 2 R. S., 2d ed., 48, sec. 61 to 65 inclusive. These sections provide that when the conveyance omits to set forth at large the order of the surrogate, either in case of a past or future sale, the chancellor shall make such order confirming the sale and conveyance as he shall deem equitable, on its appearance to him that the sale was made fairly and in good faith. The omission is put on the same footing in point of materiality, as if, on a sale under a previous statute, now repealed, some discreet person had not concurred in the

conveyance with the personal representative. The statutes bearing upon this question are cited, and their material provisions noticed, by Sutherland, J., in *Rea v. McEachron*. I collect from them that the legislature regard the recital in question as beneficial to the heirs, devisees, or creditors; as meaning that its omission shall not be overlooked in a court of law; nor the non-reciting conveyance be made available except on investigation and an order of confirmation by the court of chancery. This is certainly right, if there could be made out a probable benefit in the recital, under any supposable circumstances, to heirs, devisees, or creditors. Doubtless the legislature must have proceeded on this idea; and if so, it is not for us to deny that they were correct. At any rate, by pronouncing the conveyance good, without the requisite being supplied by the chancellor, we should supersede his jurisdiction; and in that respect, at least, our decision would conflict with the statutory provisions: See *Ex parte Hemiup*, 2 Paige, 316; 3 Id. 305.

Where certain steps are authorized by statute in derogation of the common law, by which the title of one is to be divested and transferred to another, every requisite having the semblance of benefit to the former must be strictly complied with. This is abundantly exemplified in the cases upon sales for United States direct taxes: *Jackson ex dem. Cook v. Shepard*, 7 Cow. 88 [17 Am. Dec. 502], and cases there cited. So where the interest of another is to be affected by an order which a statute says shall be drawn up in certain words, giving the form in a schedule, this must be exactly pursued or the order is void: *Davison v. Gill*, 1 East, 64. The case cited was of a proceeding by justices, to stop an old footway and substitute a new one, the statute under which they acted requiring "that the forms of proceedings set forth in the schedule annexed, shall be used on all occasions, with such additions or variations only as may be necessary to adapt them to the particular exigencies of the case." Lord Kenyon, C. J., observed: "I can not therefore say that these words are merely directory. Power is given to the magistrate to take away, on certain conditions, a right which the public before enjoyed; and this is to be done in a certain prescribed form, with such additions and variations only as the locality of the description may require. Now here there is a material variance in the order from the form prescribed; for it does not set forth the length and breadth of the new path set out in lieu of the old one." The court, therefore, held the order void; and so the public still entitled to the use of the old path through the

plaintiff's land. And see Plowd. Com. 206; 1 Kent Com. 466, 3d. ed., note d. It is said in Plowden: "Every statute that limits a thing to be done in a particular form, although it be done in the affirmative, includes in itself a negative, viz., that it shall not be done otherwise." And this is clearly so of all statutes which in affirmative words appoint or limit an order or form in things which were not known to the common law: Plowd. Com. 113.

In the case at bar, a title was to be divested and transferred to another, in a new form, and under a naked power conferred by statute. After providing for the surrogate's order of sale (1 R. L. of 1801, 323, 324, sec. 20), the next section says the conveyance shall set forth his order at large. That certainly was not done within the meaning of the statute, either in the deed to Philip Tunison or Caywood. The order recited all the previous proceedings: the account and petition for sale by the executor, naming him, the order to show cause, its publication, the hearing of the proofs, the adjudication that the estate was in debt and its personal assets insufficient, having been all applied; and a balance of five hundred dollars, besides costs, yet remaining due. The order then directs the sale, defining the two parcels of fifty acres each to be taken from the two hundred and fifty acres. The deed to Philip Tunison comes nearest a recital of this final order, and that is simply that the surrogate had by his order of such a date, directed such a parcel of fifty acres to be sold, describing it as in the order. The deed to Caywood does not even refer to the date, nor recite the description. The best is a recital of the order but in part. The adjudication showing the amount due after the exhaustion of the personal assets, was important information both to the devisees and to creditors. It was in fact a part of the same order, indicating the amount of money to be raised by the sale; and why was not that material as well as the mere description of the land? The recital of the previous proceedings was also very well; and in practice, we believe, usually makes a part of the order of sale. The statute demanding the order at large, we can not say it is complied with so long as the deed omits to recite the whole as it stands upon record. We do not say it should be literally recited; but it is impossible to say that a document is set forth at large unless every part is substantially presented. That we think is the least that the statute calls for. The conveyances from the executor were, therefore, void, and must continue so unless they shall be rectified on a proper application to the chancellor.

Upon the ground of the defective recital alone, new trials are granted in all three of the causes.

A STATUTORY AUTHORITY TO CONVEY THE TITLE OF ANOTHER must be pursued strictly, and all the prerequisites to its exercise must be fulfilled: *Corwin v. Merritt*, 3 Barb. 343; *Bloom v. Burdick*, 1 Hill, 142; *Hubbell v. Weldon*, Hill & D. 145; *Sharp v. Speir*, 4 Hill, 86; *Sharp v. Johnson*, Id. 99; *Bangs v. McIntosh*, 23 Barb. 599; *Battell v. Torrey*, 65 N. Y. 299; *Stafford v. Ingersoll*, 3 Hill, 41. It will be a sufficient compliance, however, with the law requiring executors to set forth in their conveyances the orders confirming the sales and directing conveyances, that the deed contain the whole of the substance of the orders: *Sheldon v. Wright*, 7 Barb. 52, relying upon the principal case. A familiar exemplification of the rule is afforded by the cases which hold that all the prerequisites to a valid tax sale must be strictly proved by one who claims under a tax deed: *Garrett v. Doe*, 30 Am. Dec. 653 and note page 656.

A PARTY CLAIMING UNDER THE JUDGMENT OF AN INTERIOR TRIBUNAL is bound to prove affirmatively the facts that conferred upon it jurisdiction: *Harrington v. People*, 6 Barb. 610. The surrogate's court is a court of inferior jurisdiction, and if a sale of the real estate of a deceased person is desired, it is necessary, amongst other requisites, to give the court jurisdiction, that an account of the personal estate and debts, as far as they may be discovered, be presented to the surrogate: *Corwin v. Merritt*, 3 Id. 344; *Ackley v. Dygert*, 33 Id. 191; *Hart v. Coltrain*, 24 Wend. 15, relying upon the principal case.

WHERE A SURROGATE ACQUIRES JURISDICTION, subsequent errors can be corrected only by way of appeal, and can not be taken advantage of in a collateral action: *Sibley v. Waffle*, 16 N. Y. 191, relying upon the principal case. Judgment of a court of competent jurisdiction is conclusive upon the parties as to all points directly adjudged: *Estill v. Taul*, 24 Am. Dec. 498; that is, any error in the judgment can be taken advantage of only by an appeal: *Den v. Albertson*, 22 Id. 719. But if a judgment is void it will confer no rights: Id. The judgment will be void where the court had no jurisdiction; but in general, it is necessary that the want of jurisdiction appear from the record: *Allen v. Huntington*, 16 Id. 702. But see note to the case of *Bartlett v. Knight*, 2 Id. 42.

CASES
IN THE
COURT FOR THE CORRECTION OF
ERRORS
OF
NEW YORK.

SALTUS AND SALTUS v. EVERETT.

[20 WENDELL, 267.]

PURCHASER OF GOODS FROM ONE HAVING NEITHER TITLE NOR AUTHORITY TO SELL, acquires no title.

BILL OF LADING IS TRANSFERABLE, BY THE CUSTOM OF MERCHANTS, so as to vest the transferee with all the title which the assignor had in the goods embraced in the bill of lading.

BILL OF LADING FRAUDULENTLY MADE, whereby the goods of one person are shipped to or in the name of another, without the consent or knowledge of the former, will not enable the latter to transfer the goods, even to an innocent purchaser for value in the ordinary course of business.

TROVER FOR GOODS MAY BE SUSTAINED though a lien thereon exists in favor of defendant, if before the commencement of the action, he had converted them by an absolute sale thereof. In such case no tender of the amount of the lien need be made, but the defendant may recoup the damages to the extent of such amount.

HONEST PURCHASER UNDER DEFECTIVE TITLE can not hold against the true owner. *Per Verplanck, senator.*

LAW OF MARKET OVERT HAS NEVER BEEN ADOPTED IN THIS COUNTRY. Hence one can not generally transfer a better title than he himself has. *Per Verplanck, senator.*

ABSENCE OF NOTICE OF CONFLICTING CLAIM, and of circumstances calculated to arouse suspicion, will not protect a *bona fide* purchaser for value, when he buys of one having neither title nor authority to sell, except in the case of money, bank bills, notes payable to bearer, and such other property as is transferable by mere delivery. *Per Verplanck, senator.*

ONE WHO PARTS WITH THE TITLE TO PROPERTY BY A SALE, which has been procured by a fraud upon him, can not recover the property from a *bona fide* purchaser thereof, for value, from the fraudulent vendee, without notice of the fraud. *Per Verplanck, senator.*

OWNER WHO GIVES ANOTHER SUCH EVIDENCE OF THE RIGHT TO SELL GOODS as usually accompanies the power of disposal, can not recover them when the latter has sold them to a *bona fide* purchaser. *Per Verplanck, senator.*

CONSIGNEE OF A BILL OF LADING is by his consignor vested with power to indorse the bill, and thereby transfer the title of the latter in the goods. *Per Verplanck, senator.*

OWNER, BY EXHIBITING A THIRD PERSON TO THE WORLD AS HAVING POWER TO SELL GOODS, loses the right to recover the goods from *bona fide* purchasers to whom they are sold by such person. *Per Verplanck, senator.*

MASTER OF SHIP HAS ORDINARILY NO AUTHORITY TO SELL THE CARGO, and a sale by him, unless in a case of necessity, does not affect the title of the true owner. *Per Verplanck, senator.*

TROVER by Everett against Saltus & Saltus. In August, 1825, one hundred and seventy-nine pigs of lead were shipped by Bridge & Vose, at New Orleans, on brig Dove, William Collins, master, to Tufts, Eveleth & Burrell, New York, on account of plaintiff Everett. The Dove put into Norfolk in distress and sold part of the lead to pay expenses. The rest was transferred to schooner Dusty Miller, by an agent of Captain Collins, and a bill of lading was made stating that the lead was shipped by F. M., agent for William Collins, and agreeing to deliver it in New York to order, on payment of freight. The Dusty Miller also met with a disaster, but reached New York. There the lead, by order of Captain Collins, was delivered to Coffin & Cartwright. They paid the freight, also seventy-two dollars and eighty-seven cents average on the loss by the disaster to the Dusty Miller; and on March 9, 1826, sold the lead to the defendants for five hundred and forty-two dollars and seventy-four cents. In October, 1831, plaintiff demanded the lead of defendants, and offered to pay all lawful demands thereon. Defendants declined any communication on the subject. The plaintiff then brought this action and was nonsuited in the superior court. He sued out a writ of error, and obtained a judgment of reversal in the supreme court: 15 Wend. 475. From this last judgment defendants prosecuted a writ of error to this court.

T. T. Payne, for the plaintiffs in error.

T. Sedgwick, jun., and S. P. Staples, contra.

WALWORTH, Chancellor. The plaintiffs in error were not entitled to the goods in question, on the ground that they were the purchasers thereof without notice of the rights of the real owner; they were in the same situation in this re-

spect as every other purchaser of goods from a person who had no authority to sell. If the owner of the goods had caused the bill of lading to be made out in the name of Collins, so as to give him a *prima facie* right to the goods as owner, or consignee for his own benefit, a *bona fide* purchaser might have been entitled to protection. The principle adopted in the case of *Mowry v. Walsh*, 8 Cow. 238, might be applicable to such a case; but here the change of the bill of lading itself was a fraudulent act on the part of the master of the vessel, or his agent, and could not defeat the right of the owner of the goods who had not authorized any such change. The bill of lading is, by the custom of merchants, transferable so as to vest in the assignee the title to the goods which the assignor had in them; but if a person without authority from me ships my goods and takes a bill of lading in his own name, he can not, by assigning that bill of lading to another, divest my title to the property. If by the perils of the sea, or otherwise, the master of the Dove was unable to continue the voyage, and he was obliged to send on the cargo by another vessel, he had no right to change the consignee of the goods; and if he wished to retain a lien upon the goods for the freight *pro rata itineris*, he should have done so by a special clause in the new bill of lading. In this case the unauthorized sale of the goods in the port of New York, by the master of the Dove, was probably such an act as would now be a felony, under the provisions of the revised statutes prohibiting carriers of goods, delivered to them to be transported for hire, from embezzling the goods or converting the same to their own use; and even at the time when this transaction took place, no rights could be acquired by third parties, as against the owner of the goods, by such a fraudulent act of the carrier to whom they were intrusted for carriage or transportation merely.

The question does not arise on this writ of error whether the Messrs. Saltus, by the purchase, were substituted in the place of Coffin & Cartwright as to the lien upon the goods for the freight paid by them to the master of the Dusty Miller. If there had not been an actual conversion of the goods before the commencement of the suit, the question would arise whether there ever was a lien which the purchasers from Coffin & Cartwright could claim the benefit of; and, if such lien existed, whether it had not been waived by putting their claim to retain the goods upon other grounds. It appears, however, by the evidence, that the plaintiffs in error had actually converted the goods, by selling them on the day of their purchase; and if they once had a lien

which would have rebutted the presumption of a conversion, from the mere fact of refusing to deliver on demand, when the amount of the lien was not tendered or offered to be paid, a tender after they had put it out of their power to receive the money and deliver the goods, by an actual sale, would have been a useless ceremony, and was not necessary to enable the owner of the goods to recover in an action of trover. In such a case, if there was a valid lien in favor of the defendants before the conversion, they would be entitled to be recouped in the damage, to the extent of such lien; but they could not defeat the plaintiff's action altogether.

The bill of lading signed by Collins at New Orleans was only *prima facie* evidence that the consignees were the owners of the property, and the letter of Bridge & Vose, the shippers, which was sent to the consignees with the bill of lading, was sufficient to rebut that presumption and to show that the property really belonged to Otis Everett, of Boston, in whose name the suit was brought. Besides, one of the consignees was examined as a witness, and proved that Everett, and not the consignees at New York, was the real owner of the goods. I have no doubt, therefore, that the judgment of the supreme court was correct, and that it ought to be affirmed.

VERPLANCK, Senator. This cause, though of small magnitude as to the amount of property in question, has been contested in various forms through all the courts to this tribunal of last resort. The spirit of contentious litigation ought to find little favor here; yet in this instance, I think the parties have deserved well of the public, because the main question in the case is of great importance and must frequently arise in a commercial community. It ought, therefore, to be distinctly settled on principles of general application. That those principles are not very clearly settled in our state, we need no higher evidence than the manner in which this cause now comes before us. The supreme court have reversed the unanimous decision of the superior court of law of the city of New York, and on the broad principles governing the questions which we are now to decide, there is a direct contrariety between the opinions of our highest court of common law and those of our most eminent commercial tribunal, as delivered by their chief justice, who was formerly chancellor of this state.

The main question depends upon and involves the general rule that ought to govern, between the conflicting rights of *bona fide* purchasers of personal property, bought without notice of

any opposing claim, and those of the original owner divested of the possession or the control of his property by accident, mistake, fraud, or misplaced confidence. The original owner now claims his lead against purchasers who bought for a fair price, in the usual course of trade, from persons holding the usual evidence of such property (a bill of lading indorsed to them), and in actual possession of the goods. Of these two innocent parties, which of the two is to bear the loss arising from the wrong-doing of the third?

The universal and fundamental principle of our law of personal property, is, that no man can be divested of his property without his own consent; and, consequently, that even the honest purchaser under a defective title, can not hold against the true proprietor. That "no one can transfer to another a better title than he has himself," is a maxim, says Chancellor Kent, "alike of the common and the civil law, and a sale *ex vi termini*, imports nothing more than that the *bona fide* purchaser succeeds to the rights of the vendor." The only exception to this rule in the ancient English jurisprudence was that of sales in markets overt, a custom which has not been introduced among us. "It has been frequently held in this country that the English law of markets overt had not been adopted, and consequently, as a general rule, the title of the true owner can not be lost without his consent:" 2 Kent Com. 324, and cases there cited.

To whatever and however numerous exceptions this rule of our law may be subject, it is unquestionably the general and regulating principle, modified only by the absolute necessity or the obvious policy of human affairs. The chief justice of the superior court has said, in his opinion on this case, that "it must be conceded that a purchaser for a fair and valuable consideration in the usual course of trade, without notice of any conflicting claim or any suspicious circumstances to awaken inquiry, or to put him on his guard, will, as a general rule, be protected in his purchase, and unaffected by any latent claim. But there are exceptions to this rule." Now I can not agree with the learned chief justice that this is the general rule. On the contrary, I think it obvious that it is but the broad statement of a large class of exceptions to the operation of a much more general principle, and that statement of exceptions is subject again to many limitations. I have stated the general and governing law; let us now see what are precisely the exceptions to it.

The first and most remarkable class of these exceptions relates to money, cash, bank bills, checks and notes payable to the

bearer or transferable by delivery, and in short, whatever comes under the general notion of currency. It was decided by Lord Chief Justice Holt, at an early period of our commercial law, that money and bills payable to bearer, though stolen, could not be recovered after they had passed into currency; and this "by reason of the course of trade which creates a property in the holder." "They pass by delivery only, and are considered as cash, and the possession always carries with it the property." 1 Salk. 126. A long series of decisions, beginning with *Miller v. Race*, 1 Burr. 452, has now settled the law, that possession of such paper is presumptive proof of property, and that he who received it in the course of trade for a fair consideration, without any reason for just suspicion, can hold it against the true owner, and recover on it against the drawer, maker, and other parties, even if the paper had been stolen from or lost by the former holder; such former holder retaining all his original rights only against the thief or the finder, or whoever received the paper from them under suspicious circumstances. These decisions have been argued upon as authorities (at least in the way of analogy) both at bar and in opinions of the courts, in cases involving the same question as to goods or other movable property. Hence, it was inferred that goods bought or received "in the course of trade, stand on the same footing with bank-notes or checks so received." But an examination of the cases will show that this part of the law of negotiable paper rests on grounds quite peculiar to itself, for the following reasons: 1. The protection of the *bona fide* holder of paper, transferable by delivery, extends even to cases where the paper has been lost or stolen. But it has been often decided that loss by accident, theft, or robbery, does not divest the title of the owner of goods, nor give a title in them to a fair after purchaser. 2. The rule is put by all the authorities on the express and separate ground of the necessity of sustaining the credit and circulation of the currency. Thus Lord Chief Justice Hardwicke: "No dispute ought to be made with the holder of a cash note, who came fairly by it, for the sake of currency, to which discrediting such notes would be a great disturbance." See, too, the reasoning of Lord Mansfield in all cases on this head decided before him. Thus, says he, in the case of a stolen note: *Peacock v. Rhodes*, 1 Doug. 636: "An assignee must take the thing assigned, subject to all the equity to which the original party was subject. If this rule was applied to bills it would stop their currency." Similar reasons are assigned for the same decision by American judges. 3. The

analogy between notes and movables, or goods, is expressly denied in the leading cases on this head. Thus in reply to an argument founded on that similarity, Lord Mansfield answers, 1 Burr. 457, "The whole fallacy of the argument rests upon comparing bank notes to what they do not resemble, and what they ought not to be compared to, viz., goods, or securities, or documents for debts. Now they are not goods, nor securities, nor similar to them; they are treated as cash to all purposes," etc.

Setting wholly aside, then, this part of the law as to cash, bank notes, and bills to bearer, as founded on the peculiar necessities of currency and trade, and regulated by decisions and usages peculiar to itself, what rules do we find to obtain in other instances of conflict between the rights of original owners and those of fair purchasers? After a careful examination of all the English cases and those of this state, that have been cited or referred to, I come to this general conclusion, that the title of property in things movable can pass from the owner only by his own consent and voluntary act, or by operation of law; but that the honest purchaser who buys for a valuable consideration in the course of trade, without notice of any adverse claim, or any circumstances which might lead a prudent man to suspect such adverse claim, will be protected in his title against the original owner in those cases, and in those only, where such owner has, by his own direct voluntary act, conferred upon the person from whom the *bona fide* vendee derives title, the apparent right of property as owner, or of disposal as an agent. I find two distinct classes of cases under this head, and no more.

1. The first is, when the owner, with the intention of sale, has in any way parted with the actual property of his goods, with his own consent, though under such circumstances of fraud or error as would make that consent revocable, rescind the sale, and authorize the recovery of the goods as against such vendee. But if the property passes into the hands of honest purchasers, the first owner must bear the loss. Thus, to take an instance from our own reports, where goods were obtained by a sale on credit, under a forged recommendation and guaranty, and then sold to a *bona fide* purchaser in the customary course of trade, the second buyer was protected in his possession against the defrauded original owner: *Mowry v. Walsh*, 8 Cow. 243. So, again, where the owner gave possession and the apparent title of property to a purchaser, who gave his worthless note, in fraudu-

lent contemplation of immediate bankruptcy, a fair purchase from the fraudulent vendee was held to be good against the first owner: *Root v. French*, 13 Wend. 572 [28 Am. Dec. 482]. See also *McCarty v. Vick*, 12 Johns. 348. In all such cases, to protect the new purchaser, there must be a full consent of the owner to the transfer of property, though such consent might be temporary only, obtained by fraud or mistake, and therefore revocable against such unfair first purchaser.

2. The other class of cases in which the owner loses the right of following and reclaiming his property is, where he has, by his own voluntary act or consent, given to another such evidence of the right of selling his goods as, according to the custom of trade, or the common understanding of the world, usually accompanies the authority of disposal; or, to use the language of Lord Ellenborough, when the owner "has given the external *indicia* of the right of disposing of his property." Here it is well settled that, however the possessor of such external *indicia* may abuse the confidence of his principal, a sale to a fair purchaser divests the first title, and the authority to sell so conferred, whether real or apparent, is good against him who gave it.

Thus, the consignee, in a bill of lading, is furnished by his consignor with such evidence of right of disposal, according to the custom and law of trade, so that the *bona fide* holder of the bill indorsed by the consignee is entitled to all the rights of property of the consignor in those goods, if bought fairly in the course of business, although the actual consignee, under whose indorsement he holds, has no right to the goods as against the former owner. If such goods were not paid for, they might be stopped *in transitu* by the owner, unless his consignee has already assigned his bill of lading; but that assignment divests the owner of his right of stoppage against such assignee.

The famous series of decisions in the various courts in the case of *Lickbarrow v. Mason*, 2 T. R. 63; 2 H. Bl. 211; 5 T. R. 367, which led to the establishment of the doctrine of this qualified negotiability of bills of lading, memorable alike in legal and commercial history, strongly illustrates the whole question before us. There, Buller and his associate judges, trained up at the feet of the great father of English commercial jurisprudence, maintained and established the law as we now hold it, under the influence of Mansfield's genius, upon his reasoning and on his authority, against those of Lord Loughborough and others, the most learned lawyers of their times. All the arguments and admissions of both sides show how deeply the general principle is

rooted in the law of England, that (to use Lord Loughborough's words) "mere possession, without a just title, gives no property, and the person to whom such possession is transferred by delivery, must take the hazard of the title of its author." It is only as an express exception to this rule that it was maintained, and finally established, that the custom of merchants, evidenced and sanctioned by legal decisions, and founded on those conveniences of trade, so admirably stated by Buller, had compelled the courts to consider the owner as giving his consignee evidence of the power of disposal, which it was not for him to dispute when the goods had fairly passed into other hands on the faith of that evidence. But there is no case to be found, or any reason or analogy anywhere suggested in the books, which would go to show that the real owner could be concluded by a bill of lading not given by himself, but by some third person, erroneously or fraudulently, as in this present case. The assignment of the bill of lading conveys, not an absolute right to goods, but the right and title merely of the actual consignor, who alone is bound by it.

Again: the owner may lose the right of recovering his goods against purchasers, by exhibiting to the world a third person as having power to sell and dispose of them; and this, not only by giving a direct authority to him, but by conferring an implied authority. Such an authority may be implied by the assent to and ratification of prior similar dealings, so as to hold such person out to those with whom he is in the habit of trading, as authorized to buy or sell. It may be inferred from the nature of the business of the agent, with fit accompanying circumstances. "If a man," says Bayley, J., in *Pickering v. Buck*, 15 East, 44,¹ "puts goods into another's custody, whose common business it is to sell, he confers an implied authority to sell;" and the cause was decided on that ground. But this implied authority must arise from the natural and obvious interpretation of facts, according to the habits and usages of business; and it never applies where the character and business of the person in possession do not warrant the reasonable presumption of his being empowered to sell property of that kind. If, therefore, to use an illustration of Lord Chief Justice Ellenborough, in the case just cited, a person intrusts his watch to a watchmaker to be repaired, the watchmaker is not exhibited to the world as an owner, or agent, and credit is not given as such, because he has possession of the watch; the owner, therefore, would not be bound by his sale. When these exceptions cease, the general

1. *Pickering v. Buck*.

rule resumes its sway; and the law is therefore clear, that an agent, for a particular purpose, and under a limited power, can not bind his principal if he exceed his power. "Whoever deals with an agent constituted for a special purpose, deals at his peril, when the agent passes the precise limits of his power:" 2 Kent Com. 621, and the authorities there cited.

Beyond the precise exceptions I have above stated, I think our law has not carried the protection of the fair vendee against the defrauded or unfortunate owner. It protects him when the owner's misplaced confidence has voluntarily given to another the apparent right of property or of sale. But if the owner loses his property, or is robbed of it, or it is sold or pledged without his consent by one who has only a temporary right to its use by hiring, or otherwise, or a qualified possession of it for a specific purpose, as for transportation, or for work to be performed on it, the owner can follow and reclaim it in the hands of any person, however innocent. Among the numerous cases to this effect, I will cite only that of *Howe v. Parker*, 2 T. R. 376,¹ which I select not only on account of the strong and unhesitating manner of the decision, but because it was pronounced by the very judges who, in the case of *Lickbarrow v. Mason*, had carried the protection of a *bona fide* purchaser under a bill of lading far beyond the rigor of the ancient law. There, plate had been pawned by a widow who had only a life interest in it under her husband's will, of which fact the pawnee had no notice. It was not doubted that the lien for the moneys advanced on such pledge was void against the remainder-man, after the widow's death. "*Per curiam*: This point is clearly settled, and the law must remain as it is, until the legislature think fit to provide that the possession of such chattels is proof of ownership."

In order to decide in such conflicts between the claims of equally meritorious sufferers by the wrong of a third party, public policy must draw an arbitrary line somewhere, and the greatest merit of such a rule must be its certainty and uniformity.

The rule of our law, as I understand it, is perfectly consistent with the equity between the parties, as far as such equity can apply; and it serves the great interests of commerce, in a state of such extensive foreign and domestic trade as ours, by protecting the property of the stranger, as well as of our own citizens, against the possible frauds of carriers by sea, or by internal transportation, whilst it throws upon the resident merchant the responsi-

¹ *Hoare v. Parker*.

bility of taking care with whom he deals, and teaches him a lesson of wholesome caution. It is no mean proof of the wisdom of the rule, that it agrees in substance with the provisions of the Napoleon code. The code, like our law, holds as a general rule, that the sale of goods, by any but the true holder, is a nullity; "*La vente de la chose d'autrui est nulle*:" Code Civil, III., art. 1599. It confines the authority of the special agent or *mandataire* to the strict limits of his power; and in sales, the power must always be special and express: Code Civil, art. 1989. It allows the right of revendication or stoppage *in transitu* against the insolvent or fraudulent purchaser or consignee; but that right ceases, as with us, against the consignee, when the goods have been fairly sold according to the bills of lading; "*vendues sans fraude sur factures et connaissements*:" Code de Commerce, liv. III., art. 576, 577, 578. The Scotch law, as I gather from Bell's Commentaries, lays down a different rule, that "a purchaser, in the course of trade, should be protected in the purchase of goods from any one who has them in lawful possession." This agrees with the doctrine of our superior court, and might be a safe enough rule, if generally adopted and understood. But it is not the rule of our own law, which is perhaps quite as wise, as well as certainly founded on a much larger and wider commercial experience.

Let us apply these conclusions to the present case. Collins, the person whose sale it is asserted must divest the original owner of his rights in favor of the *bona fide* purchaser, stands, it is said by the superior court, in a double relation of "a master, who is at the same time the consignee of the goods, and who himself filled the character of shipper, and has therefore an undoubted power to sell, and his *bona fide* transfer will be effectual to purchasers against any secret trust for others with which his apparent title might be affected." Had the lead been consigned to Collins from the intermediate port, by the owner or his agent, this would be true. But it is shipped by Myers, of whom neither the owner, nor any one with full power to represent him in this matter, had any knowledge as an agent, and under whose care the vessel and cargo were placed by Collins, so that he appeared only as his representative, and thus he styles himself in the bill of lading. The plaintiff below comes in no wise within the rule I have stated. He has neither given to Collins documentary and mercantile evidence of property in a bill of lading from himself or his own agent with competent power, nor the evidence customary in business, such as to

hold him out as an agent authorized to change the title of his property in his goods. The assumed authority of shipping goods in his own name and to his own order, at Norfolk, and the documentary evidence of it in the bill of lading, can have no more effect as to the title of the property, than if he had forged such a bill of lading at New Orleans.

Neither does the selection of a ship and its master vest in the master any implied authority to sell the ship, or any part of her cargo. His business is to carry the goods, and no more, with some other clearly-defined and very limited powers, to be exercised only in cases of absolute necessity. He stands in the same legal relation to his cargo with the watchmaker, in the case supposed by Lord Ellenborough, who has in his hands a watch to be repaired. He is not exhibited to the world as the owner, or agent for selling: and if he does sell it, the sale is void against the true proprietor. The law of shipping is well known to the commercial world, to declare that the master has no authority to sell the cargo, or any part of it, unless under circumstances of pressing necessity abroad; and of that absolute necessity the burden of proof rests on the purchaser, and the presumption is against it. As Judge Bayley states the law, 3 Barn. & Cress. 196:¹ "The captain has no right to act as agent for the owner of goods, unless in absolute necessity. The purchaser obtains no property by the act of his professing to sell." And this was held where the master acted in perfect good faith. How much stronger is the case of a probable fraud! Thus again, in *Freeman v. East India Co.*, 5 Id. 619,² Abbott, C. J., says: "A sale of a cargo, or any part of it, by the master, can confer no title, unless there was an absolute necessity;" and the reason of the rule is thus assigned by Judge Best in the same case: "A carrier by sea and by land stands in the same relation to the owner of goods to be carried. Their duty is to carry the goods, and the authority only such as is necessary. The purchaser, knowing that necessity alone can justify the sale, and give him a title to what he buys, will assure himself that there is a real necessity for the sale before he makes the purchase; and caution on his part will prevent what has frequently happened, the fraudulent sale of ships and cargoes in foreign ports." Such, then, being the well-settled and generally known law, the selection of a master or any other carrier, by sea or land, does nothing to exhibit such a carrier to the world as having the power of disposing of the goods he carries. The owner does nothing to

1. *Morris v. Robinson*.

2. 5 Barn. & Ald. 617.

enable him to commit a fraud on third persons. He gives merely a qualified possession, and if that is turned into an assumed right of ownership, it is tortious conversion, and will not divest the owner's title.

It is true that the rule will sometimes, as was urged by Chief Justice Jones, "involve purchasers in great perils;" but that peril can scarcely be called "unreasonable," since there is a reason of public policy of at least equal weight to counterbalance this inconvenience. It is the same which is the ground of the absolute prohibition to a master or carrier to sell the goods he transports, except under insurmountable necessity; it is to prevent, in the language of the court in the case just quoted, 5 Barn. & Cress. 620,¹ "fraudulent sales of ships and cargoes in foreign ports." Now the fraudulent consignment or change of the apparent evidence of property for the purpose of selling elsewhere, is but another form of the same evil. I may add that this same rule, however rigid and occasionally hard in its operations, is no small safeguard to the protection of the owner's rights in goods and other property, in active commerce necessarily placed under the temporary control, and in the legal though qualified possession of agents, sailors, carriers, boatmen, servants, and clerks, as well as of those who may have them stored for safe keeping, and their clerks, porters, and servants.

On the other question, as to the right of the defendants below to stand in the place of their vendor, and to be protected to the extent of the charges on the lead for freight, as claimed by Collins, I need say but little. The right of lien in such circumstances (if any right exist here) depends upon actual possession by the factor, or carrier, or his immediate agent. When the goods are sold and delivered to a third person, the lien, as such, expires with the possession. This is the distinction between the present case and the former suit against Coffin & Cartwright, who were immediate agents or bailees of Collins.

The two courts below have agreed in deciding against the validity of the objections to the evidence raised on the trial of the cause, and I have nothing to add to the reasons they assign; to all which I fully assent. The importance of the principles and rules not only of decision but of active business involved in this cause, especially in relation to that vast and busy community which I immediately represent in this body, has led me to examine this whole head of law with an interest and at a length wholly disproportioned to the amount of value in controversy.

1. 5 Barn. and Ald. 617.

If the views I have been able to present shall in any way, directly or indirectly, tend to settle the law on this head, or make it more clearly and correctly understood, the study I have given the subject will have been well bestowed.

I am of opinion that the judgment of the supreme court, reversing that of the superior court of New York, be affirmed.

Judgment unanimously affirmed.

HONEST PURCHASER under a defective title can not hold against the true owner: *Ash v. Putnam*, 1 Hill, 306; *Robinson v. Dauchy*, 3 Barb. 30; *Cobb v. Dows*, 9 Id. 243; S. C., 10 N. Y. 339; *Linnen v. Cruger*, 40 Barb. 365; *Caldwell v. Bartlett*, 3 Duer, 352; *Florence Sewing Machine Co. v. Warford*, 1 Sw. 449; *Boyce v. Brockway*, 31 N. Y. 493; *Rawles v. Deshler*, 28 How. 69. For generally an owner can not be deprived of his goods unless by his own act; *Fan Namee v. Bank of Troy*, 8 Barb. 315; S. C., 5 How. 164; *Blossom v. Champion*, 37 Barb. 563; *Ballard v. Burgett*, 47 Id. 651; *Spaulding v. Brewster*, 50 Id. 144; *Wilson v. Nason*, 4 Bosw. 168; *Anderson v. Nicholas*, 5 Id. 130; *Hoffman v. Carow*, 22 Wend. 318; *Brower v. Peabody*, 2 Abb. 218; S. C., 11 How. 496; *Piser v. Stearns*, 1 Hill, 88; *Weaver v. Barden*, 3 Lans. 340; *Bassett v. Lederer*, 3 N. Y. S. C. 675; S. C., 1 Hun, 279; *Roberts v. Dillon*, 3 Daly, 52. But if the owner of goods furnished another with *prima facie* evidence of a power of disposal, he will be bound by the latter's sale to a *bona fide* purchaser: *Shearer v. Barrett*, Hill & D. 72; *Dows v. Greene*, 16 Barb. 78; *McNeill v. Tenth Nat. Bank*, 48 N. Y. 329; *Devlin v. Pike*, 5 Daly, 103; *Moore v. Muller*, 6 Lans. 402. In *Steelyards v. Singer*, 2 Hill, 98, a sewing-machine, held on the terms that it should become the property of the purchaser only upon full payment of the purchase price, was sold to a *bona fide* purchaser. The court held that he had perfect title, upon the ground that the *indicia* of ownership were sufficient to have warranted the purchase. This case, with the others previously cited, relied upon the principal case. But the last named case does not seem to accord with *Neidig v. Eifer*, 18 Abb. 353.

Where goods are obtained by a fraud that amounts to a felony, the vendor may retake the goods even from a *bona fide* purchaser: *Robinson v. Dauchy*, 3 Barb. 30; *Stephens v. Board of Education*, 6 N. Y. S. C. (T. & C.) 150. But in general the title of the *bona fide* purchaser from a fraudulent vendee is paramount to that of the original owner: *Dows v. Rush*, 28 Barb. 184; *Stevens v. Hyde*, 32 Id. 177; *Lacker v. Rhoades*, 45 Id. 501; *Craig v. Marsh*, 2 Daly, 63; *Reimer v. Nagle*, 1 E. D. Sm. 238; *Pringle v. Phillips*, 5 Sandf. 173; *Dows v. Greene*, 24 N. Y. 644; *Manufacturers' etc. Bank of Buffalo v. Nat. Bank of Buffalo*, 2 N. Y. S. C. 403.

BILL OF LADING WILL NOT PROTECT THE CONSIGNEE who has made advances upon its faith, if the goods shipped were not those of the consignor, and were not shipped with the consent of the true owner: *Bassett v. Spifford*, 2 Daly, 436; *Hazard v. Fiske*, 18 Hun, 281; *First Nat. Bank of Toledo v. Shure*, 61 N. Y. 297; *Blossom v. Champion*, 37 Barb. 563; *Covell v. Hill*, 6 N. Y. 380. But the factor's act which provides that a consignor shall be deemed the true owner, so far as is necessary to protect the consignee in his advances, will protect the consignee who has made advances upon goods, which were delivered to the consignor under a sale, which was conditioned to the effect that the title should remain in the vendor until the full purchase price was paid: *Bates v. Cunningham*, 2 Hun, 28.

CONSIGNEE WHO IS IN POSSESSION OF BILLS OF LADING will be presumed the owner, but the presumption will not be indulged in if the consignor retain possession of the bills: *Hauterman v. Bock*, 1 Daly, 369.

TROVER MAY BE BROUGHT notwithstanding that a lien exists upon property, if an absolute unqualified refusal to deliver the goods has been made to a demand of the true owner: *Dows v. Morewood*, 10 Barb. 187; *Long Island Brewery Co. v. Fitzpatrick*, 18 Hun, 392. And where a factor pledges goods, an action of trover may at once be brought against his pledgee, notwithstanding the factor's lien: *Walther v. Wetmore*, 1 E. D. Sm. 511. Such lien in these cases can only be shown in mitigation of damages: *Keutgen v. Parks*, 2 Sandf. 66.

The principal case is cited likewise in *Mechanics' Bank v. New York & N. H. R. R. Co.*, 13 N. Y. 601; S. C., 4 Duer, 559.

The cases in which an owner may acquire title without the concurrence of the true owner are reviewed in the note to *Williams v. Merle*, 25 Am. Dec. 605.

S. AND M. ALLEN v. SUYDAM AND BOYD.

[20 WENDELL, 321.]

DRAWERS AND INDORSERS OF BILL PAYABLE AT SIGHT ARE RELEASED from liability by unreasonable delay in presenting it for acceptance or payment.

AGENT TRUSTED, FOR COLLECTION, WITH A DRAFT OR BILL PAYABLE ON A PARTICULAR DAY is liable for any unnecessary delay in presenting it for acceptance, although it may not be yet due.

DAMAGES RECOVERABLE OF AN AGENT FOR FAILING TO PRESENT A BILL OR CHECK FOR ACCEPTANCE or payment, do not extend beyond the actual loss occasioned by such failure. If none of the parties were released from liability by the neglect of the agent, nominal damages only are recoverable from him.

TO RECOVER OF AN AGENT THE WHOLE AMOUNT of a bill or draft, because of his neglect to present it for acceptance or payment, the plaintiff should at least prove a state of facts from which it appears probable that such neglect had caused damage to such amount.

DAMAGES TO THE AMOUNT OF THE BILL OR DRAFT are, *prima facie*, recoverable if the neglect of the agent to present it for payment or acceptance has discharged a drawer or indorser who was apparently able to pay it, unless he is able to show, notwithstanding, that the whole amount of the bill has not been lost by such negligence.

CASE by Suydam & Boyd against S. & M. Allen, for negligence in not presenting for acceptance a draft dated July 21, 1833, drawn at New York by John Eastabrook on W. W. & J. E. Eastabrook, of Concord, N. H., in favor of plaintiffs, payable two months after date. Plaintiffs received the draft August 16, 1833, and the same day, placed in the hands of defendants, for collection. They kept it until September 2, when they sent it to the cashier of a bank in Concord, who received it on the sixth

of the same month. On the seventh he called on the drawers, and asked whether they were ready to accept. They answered that they were not, and would not accept without instructions from the drawer, from whom they expected to hear soon. He called again on the tenth. The drawees then notified him that they had been instructed by the drawers not to accept. The draft was at once protested for non-acceptance, and sent back to defendants, who received it on the sixteenth. They sent it to plaintiffs and demanded a receipt for the draft. The plaintiffs declined to accept the draft, and on the nineteenth notified defendants that they would be held responsible for any neglect on their part. October 9, 1833, the drawer died insolvent. When he drew the draft he had some money, how much did not appear, in the hands of the drawees. He had no funds with them when the demand for acceptance was made. The drawees testified that the delay in demanding acceptance was immaterial; that they never accepted unless first instructed to do so by the drawer. After August 16, 1833, drafts of John Eastabrook on the same drawees, to the amount of two thousand dollars, were accepted and paid or secured. He was in business in New York, as a merchant, until the date of his death; but on July 24, 1833, he was unable to pay plaintiff a note for six hundred and six dollars and seventy-seven cents, and it remained unpaid, until taken up by the draft in suit here. The jury was charged that, for not transmitting the draft for acceptance with all reasonable diligence, the defendants were liable for any damages sustained by plaintiffs; and that as court and jury had no knowledge what such damages were, save from the amount of the draft, damages should be found in that amount. Verdict and judgment accordingly. Defendant sued out a writ of error.

Gray and Foot, for the plaintiffs in error.

D. Lord, jun., contra.

WALWORTH, Chancellor. Two questions of importance to the commercial community are presented for our consideration and decision in this cause: 1. Whether an agent or broker who receives for collection a draft or bill of exchange payable at a particular day, or a certain number of days after its date, is under any obligation to present the same to the drawee for acceptance immediately, and before the time when the draft is due and payable? And 2. If he is, whether the person who has given him such draft or bill for collection, can, in case of his neglect to present the same before the day of payment, recover the whole

amount due thereon, with interest; although the owner has not in fact sustained damage to that extent, by the neglect of his broker or agent to present the bill for acceptance without any unnecessary delay?

A bill payable at sight or a certain number of days after sight, must be presented for acceptance and payment, or for acceptance only, without unreasonable delay, or the drawer and indorsers will be discharged, for they have an interest in having the bill accepted immediately, in order to shorten the time of payment, and thus to put a limit to the period of their liability; and also to enable them to protect themselves by other means, before it is too late, if the bill is not accepted and paid within the time originally contemplated by them. But in relation to a bill payable at a day certain, as at a fixed time after its date, it is perfectly well settled, not only in this country and in England, but also in Scotland and in France, that the drawer or indorser of the bill is not discharged by the neglect of the holder to present the same for acceptance immediately, or until the time when it becomes due and payable. If, however, such a bill is actually presented for acceptance, and is dishonored before it becomes due, notice of such dishonor must be given to the drawer or indorser without delay, or he will be discharged: 3 Kent Com., 2d. ed. 82; *Townsend v. Sumrall*, 2 Pet. (U.S.) 170; *Goodall v. Dolley*, 1 Tenn. 712;¹ Bayl. on Bills, 212; Glen, 109; Byles, 102; Evans, 80; Muir, 22; 2 Pardessus, No. 358, p. 417, 2d. Paris ed. All the writers agree, however, that the owner of the bill has an interest in having it presented for acceptance without delay, although such presentment is not necessary in the case of a bill payable on a day certain, to enable him to retain his claim against the drawer or indorser of such bill; and that if the agent who has been intrusted with the bill for the purpose of getting it accepted and paid, or accepted only, neglects to comply with the direction of the owner, to get the bill accepted without any unnecessary delay, he will be liable to the owner for the damage which the latter has sustained by such negligence.

Pardessus says, that the right to require an acceptance in such a case is one which the holder of the bill may use or not, as he thinks proper, but that it is certainly an advantage to him to demand such acceptance; for if the drawer is in credit, the drawee will probably accept, and the holder will thus obtain an additional security for his debt; whereas, if he delays to present the bill for acceptance until it becomes due, and the drawer fails

in the mean time, the drawee may then refuse to accept; and he might have added, for such is the rule of the French law on the subject, that if the bill was protested for non-acceptance before it became due, the holder would then have been entitled to demand, both of the drawer and of the indorsers, security for the payment of the bill when it should become due, or for reimbursement, with the expenses of protest and re-exchange. Pardessus also says, that the bearer of the bill may hold it as a mere agent, to do what is necessary for the interest of his principal; in which case he ought to act according to the express or implied duties which are derived from his relation to such principal; and among the duties which his situation imposes upon the agent, is that of presenting the bill for acceptance whenever the law or prudence imposes such an obligation upon him: 2 Pard. No. 358, p. 417, 420; No. 583, p. 669. It was upon this ground that the case of *The Bank of Scotland v. Hamilton*, referred to in a note to Bell's Commentaries and also in Chitty on Bills, was decided. And Glen, who also has a brief note of that case, states as exceptions to the rule, that it is not necessary to present a bill, payable at a time certain, for acceptance, before it becomes due; the case of a direction to the payee or holder of the bill to present it immediately; and the case of a bill sent to an agent for negotiation: Glen on Bills, 109.

The council for the plaintiffs in error, however, attempted to take the case out of this last exception to the general rule, on the ground that these agents only received the bill for collection, and that they received no instructions to present it for acceptance before it became due. I infer, however, from the note of the case of *The Bank of Scotland v. Hamilton*, as given by Glen, that the present case can not be distinguished from that in this respect. For it there appears that the bill then in question was finally presented for acceptance on the evening of the fourth day from its date, after the drawer had failed, and then only in consequence of a letter from Dunlop, who had sent the bill to the agents in Glasgow three days before. From that statement of the case, I think we may fairly presume there were no special directions to the agents to present the bill for acceptance when it was originally sent to them for collection, especially as it had but four days to run when it was originally discounted by Dunlop.

On this subject, Pothier says, in regard to the indorsement of a bill by the owner thereof to another, as a mere agent to receive the amount due thereon for the indorser and as his proxy: "The

contract which such an indorsement implies, and which it makes between the indorser and the person to whom he makes his order, is a contract of agency, and creates the ordinary obligations of an agent; and consequently, he to whom the order is given is liable in the character of an agent, as regards his indorser, the owner of the bill, to obtain acceptance if it has not already been accepted, and to go when the bill becomes due to receive payment thereof, and remit him the amount; and also, in default of acceptance or of payment, to make the protests, etc., which are necessary in such cases, and the indorser on his part is bound to make good the whole of the expenses which have been incurred therefor by the indorsee." Poth. *Traite Du Cont. De Change*, c. 4, No. 82. Again: "The bearer of the bill, where he is merely the agent of the owner, ought to present it as soon as possible to the drawee to have it accepted. It is very important to have it accepted, as it is only by accepting it that the drawee becomes bound to pay it. Without such acceptance, the owner of the bill has for his debtor only the drawer of the bill, to whom he has paid its value. Therefore if the drawer should happen to fail, the bearer of the bill who had neglected to present it for acceptance would be liable to damages, if it was his fault, in favor of the owner of the bill for whom he was agent." Id., No. 128. The principles thus laid down by Pothier are recognized by Beawes and Paley as sound and correct, in relation to the duties and liabilities of agents who are employed in negotiating or collecting bills of exchange; and I can see no good reason why they should not be applied to the case now under consideration. If the receiving a bill by an agent, to collect, implies an obligation on his part to take the necessary steps to charge the drawer and indorsers by protest and notices, in case it is not accepted and paid by the drawee, I do not see why due diligence on the part of the agent, in procuring the acceptance of the drawee without delay, when it may be necessary or beneficial to the interests of the principal, should not also be implied, as it is the duty of a faithful agent to do for his principal, whatever the principal himself would probably have done, if he was a discreet and prudent man. Even where the principal is habitually negligent in attending to his own interests, it forms no excuse for similar negligence on the part of his agent. The fact, therefore, that the bill in this case was not put into the hands of the agents for collection until some time after it bore date, was no legal excuse for their negligence in not sending it on for acceptance and payment without unnecessary delay. For these

reasons, I agree with the court below, that the Allens were legally liable to the owners of this bill for the damages, if any, which the latter sustained by the non-presentment of the bill to the drawee for acceptance previous to the time it became due.

In relation to the amount of damages, however, I think the charge of the judge who tried the cause was clearly wrong; and that it has unquestionably produced great injustice in this case. As we have before seen, the relation between the drawer or indorser of the bill and the person to whom it is transferred for the mere purpose of negotiation or collection, is not the relation of indorser and indorsee, so as to throw the loss of the whole amount of the bill upon the latter, if he neglects to present the same for acceptance and payment in time, or to give notice of its dishonor to the indorser, as required by law. Nor will the payment of the damages by the agent, have the effect to subrogate him to all the rights and remedies of the person from whom he received the bill, as against other parties who may be liable for the payment thereof; but it is a mere contract of agency, which leaves the indorser to all his rights and remedies for the recovery of his debt as against other parties, and only renders the indorsee liable as agent for the actual or probable damages which his principal has sustained in consequence of the negligence of such agent. This principle was distinctly recognized by the court of king's bench in England, in the case of *Van Wart v. Woolley*, 5 Dow. & Ry. 374, where the plaintiff had not lost his remedy against the drawers of the bill, or the persons from whom he received it, by reason of the neglect of the agents to present it for acceptance in due time; the drawers of the bill in that case having drawn without authority when they had no funds in the hands of the drawees, and Irving & Co., who had sent the bill to the plaintiffs in payment, not standing in the situation of indorsers of the bill, as their names did not appear upon it. In that case, however, if there had been any evidence to warrant the belief, that the bill would have been accepted if an immediate acceptance or rejection of the bill by the drawees had been insisted on, according to the decision in the case of *The Bank of Scotland v. Hamilton*, the loss which had arisen from the neglect of the defendant in not pressing for an acceptance, or in not giving due notice of the dishonor of the bill immediately, if it could then probably have been collected from the drawees, should have fallen upon Woolley & Co. instead of Irving & Co., who had remitted the same to Van Wart; and the plaintiff would then have been permitted to recover whatever

damages had been sustained by such negligence, for the benefit of Irving & Co. In that respect, Irving & Co. stood in the same relative situation to Van Wart, as Dunlop did to the Bank of Scotland, in the case before referred to; and Woolley & Co. occupied the situation of Hamilton & Co., who were held liable in that case, in exoneration of Dunlop's liability. The only difference in principle which I can see between the two cases is, that in the Scotch case it was evident that the bill would probably have been accepted and saved, if it had been presented for acceptance on Saturday, when it was received by the agent in Glasgow, instead of being kept back until Tuesday evening, when news of the drawer's failure had reached that place; and therefore, to exonerate Dunlop, who remitted the bill, the agents in Glasgow were very properly charged with the amount of the bill, the whole of which had been lost through their negligence, except the small amount of dividend which the bank would be entitled to out of the drawer's estate under the commission of bankruptcy against him; whereas in the case of *Van Wart v. Woolley* there was no reason to believe that the bill would have been accepted if the agent had insisted upon an answer immediately, and there was as little probability that anything would have been obtained from the drawers, if Van Wart or Irving & Co. had received notice of the dishonor of the bill immediately after it was received by the agent in London. In the latter case, therefore, the damage which either Van Wart or those who had transmitted him the bill in payment had sustained, was merely nominal. Besides, the supreme court of this state having decided, that neither the drawers nor Irving & Co. were discharged from their liability to the plaintiff by this neglect of his agent, neither of them in fact having been injured by such neglect, the plaintiff upon the second trial was of course only held to be entitled to such damages as he had sustained, and which were nominal only.

If the rule laid down by the judge who tried the present case was correct, that the principal was entitled to recover the whole amount of the bill and interest, because there was no other evidence to enable the jury to discover what the damage was, then the plaintiff in the case of *Van Wart v. Woolley*, should have been permitted to return his verdict upon the first trial; as it did not then appear whether he could actually succeed in collecting the money, either from the drawers of the bill or from Irving & Co.; neither did it then appear whether by the laws of this state, where they resided, they were not actually discharged from lia-

bility, so that no judgment could be recovered against them in consequence of the negligence of the agent. The granting of the new trial in that case, therefore, proceeded upon the principle that the agent was not liable for the whole amount of the bill, unless damages to that extent had been sustained by his neglect, and that to recover damages to that extent it was incumbent upon the party claiming, to give sufficient evidence to satisfy the court and jury that it was at least probable that he had sustained damages to that amount. Neither the Scotch nor the English case, therefore, is an authority to sustain the charge of the judge in relation to the amount of damages in the present case; on the contrary, the case of *Van Wart v. Woolley*, is a direct authority to show that the agent ought not to be charged with the whole amount of the bill, unless there is sufficient evidence to render it at least probable that the whole amount of the debt would have been saved if the agent had discharged the duty which his situation imposed upon him.

Where there is a reasonable probability that the bill would have been accepted and paid if the agent had done his duty; or where, by the negligence of the agent, the liability of a drawer or indorser who was apparently able to pay the bill has been discharged, so that the owner of the bill can not legally recover against such drawer or indorser, I admit the agent by whose negligence the loss has occurred is, *prima facie*, liable for the whole amount thereof, with interest, as damages, unless he is able to satisfy the court and jury that the whole amount of the bill has not been actually lost to the owner in consequence of such negligence. The case under consideration, however, is one of a very different description. Here it is perfectly evident, from the testimony of one of the drawees, that the draft would not have been accepted at any time after it was received by the Allens for collection, as the drawees had received express directions from the drawer not to accept; nor would they have accepted it, even without such a prohibition, unless they had previously been advised so to do by the drawer. The fact, also, that the drawer's credit was not good at the time this draft was received for collection, he having suffered his note to Boyd & Suydam to lie under protest for some time, and the express directions given by him to the drawees not to accept this draft, rendered it highly improbable that he would have paid the draft himself to save his credit, if it had been sent back protested at an earlier day.

From the facts of the case, therefore, I think there was no

ground for supposing that the owners had sustained any actual damage from the mistake of the Allens, in not sending on the bill for acceptance immediately after they received it for collection in New York; or that their chance of obtaining payment from the drawer was materially impaired by the delay of the protest for a few days. Under the circumstances of this case, therefore, I think the jury should have been instructed that upon the evidence, the plaintiffs were only entitled to nominal damages; or at least they should have been told to find only such damages as they should, from the evidence, believe it probable the plaintiffs might have sustained by the delay in presenting the draft for acceptance immediately; for I do not see how it is possible for any one to believe, or even to suppose it probable from this evidence, that the whole amount of this draft was in fact lost to the plaintiffs below, by the delay of the Allens in presenting it to the drawees, and giving notice of the dishonor thereof immediately to the drawer, who never intended that it should be accepted and paid.

For these reasons I am of opinion that the judgment of the court below should be reversed, and that a *venire de novo* should be awarded; to the end that no more damages may be recovered than such as a jury may believe it probable, from the evidence adduced, that the plaintiffs may have sustained from the negligence of their agents.

VERPLANCK, Senator. In this case the defendants in the court below were agents for collecting for a commission, a draft on another state, payable after date. What are the duties and responsibilities of agents in regard to presenting such paper for acceptance? Legal authority as well as commercial usage, has long settled as a general rule, that the holder of a bill of exchange, payable at a specific time, is not obliged to present such bill for acceptance in order to hold the drawer or prior indorser. It is, indeed, usual as well as prudent, to do so, both for the sake of the added security and better credit of the paper, and because in case of refusal, recourse may be had immediately to the drawer. It is, therefore, the duty of an agent for collection, to exert the customary prudence, and present such paper for acceptance without delay, since, by neglect, his principal may either lose the drawee's security and the credit it gives, or else be prevented from making such inquiries and demands, or using such legal or precautionary measures towards the drawer or other parties as might tend to secure his debt. This distinction was long ago stated by Pothier, who points out the different obli-

gations of him who holds a bill as an agent ("mandataire"), "who ought to present it for acceptance as soon as possible;" and those of him who holds as owner ("lorsque le porteur est en meme temps le propriétaire"), who may present it when he thinks fit: *Contrat du Change*, partie 1, c. 5, art. 128.

This distinction was recognized in the English elementary books (see earlier editions of Chitty on Bills, and other writers there cited), as part of the general commercial law of Europe, before any express judicial decision to that point. The modern case of *Van Wart v. Woolley*, 5 Dow. & Ry. 374; 3 Barn. & Cress. 439, has sanctioned the principle judicially, by deciding that the delay of an agent to give notice of non-acceptance of bills, subjected him to damages, even when the drawer was not discharged. The case of the *Bank of Scotland v. Hamilton*, cited in 1 Bell's Commentary on the Laws of Scotland, 409, decided by the Scotch court of sessions, is remarkable for its similarity to the present case, and is entitled to the same authority with us, as it receives in England (see Chitty on Bills, 300, who refers to that case as an authority to this point), as well on account of the general uniformity of the law of negotiable paper in the civilized world, as because it is evident from the books that on this head the Scotch law conforms to the English, and is much governed by its usages and decisions. In that case, a bill payable at Glasgow, three days after date, was sent to an agent at that city for collection. It is stated "that it is not customary for *porteurs* (bearers) of bills at short dates to present them for acceptance." Before the day of payment the drawer failed, and the Glasgow bank refused to accept. It was not clear whether the bank would have accepted the draft if it had been immediately presented, for the bank had no funds of the drawer, and the practice had been to make provisions for such drafts at the day of payment. The action was against the agents. "The court held that, as agents, they were bound immediately to present the bill for acceptance."

Thus, it seems to be the general commercial law of the civilized world, that when a bill is payable at a day certain, the drawer and indorser are not discharged, if the bill is not presented until the day of payment. Yet it is still the duty of the agent for collection to present the bill for acceptance, without delay, and to give immediate notice of refusal to accept. The reason of this, I take to be, that the drawer, by fixing a day certain for payment, assumes the responsibility of providing funds at that time, whatever may have been his previous credit with

the drawee. Again: an indorser makes, as the phrase is, "a new bill on the same terms; and besides, he waives his right of immediate acceptance, by not enforcing it, but putting his bill into circulation without acceptance." Not so, he who places a bill in his agent's hands for collection. He makes no waiver or postponement of any of his rights, but looks directly to the means necessary or expedient for his own security. In the present instance, the draft, which the payees might have retained until the day of payment had they thought fit, was placed directly upon receiving it, in the hands of agents, who were to receive "a commission or compensation for collecting the same." It was retained for seventeen days by the agents, who could have forwarded it for acceptance the next day. Nor after it had been refused acceptance, did they again present it for payment. In the delay of presentation for acceptance, there was want of due diligence.

The principle is familiar, that an agent for pay is bound to use such means, care, skill, and precaution, as are adequate to the due execution of his trust. He must use the ordinary diligence of a skillful and prudent man in such affairs. Now an early presentment for acceptance, is an obvious precaution which a prudent man of business would take, to insure collection of a questionable draft. By this neglect or delay, the payees were prevented from making those demands and taking such immediate measures as to the drawer, on receipt of notice of non-acceptance, as might possibly have secured the payees in some way or other. At the late period at which they did receive such notice, they preferred looking to the responsibility of their agents. These must be held responsible for the consequences of their negligence to the amount of the damage so caused. Nor is it a sufficient defense of the agents, that the bill would not have been accepted if immediately presented, because the drawer had directed that it should not be, nor that it was uncertain whether the funds in the hands of the drawees were sufficient or not, to meet the draft at the day fixed for payment. At and after the time when the draft should have been presented, the drawer was in business at New York, struggling for and obtaining credit, and having the command of funds which he applied to pay other drafts presented subsequently to the date, when with due diligence, notice of the non-acceptance of this bill would have been received. Whatever might have been his first intention, it was not for a court and jury to assume the broad presumption that an immediate demand, upon return of the

draft, with such other legal measures as the state of business between the parties or other circumstances might render advisable, would not have led to the ultimate payment. As a mere conjectural inference from the character and course of business of Eastabrook, as incidentally presented in the evidence, I should think the probability rather the other way; and that immediate and urgent measures might perhaps have prevented loss. His death and the consequent insolvency of his estate, have left all this mere matter of conjecture; but it is quite immaterial as to the question of the agent's duty and the right of action against him, though were it distinctly in evidence either way, it might affect the measure of damages.

Thus far, then, I think the law quite clear as to the rights of holders of bills, and the duties of collecting agents; but I have had more hesitation as to the rule of damages. Is the plaintiff in similar cases to be obliged to make out in evidence the precise actual amount of the damage he sustained, and thus to give to the party in fault all the numerous and great advantages of doubt, uncertainty, and difficulty in the proof? Or are we to apply to these cases the doctrine of laches in commercial paper, as between the holder and other parties, and consider the agent as having made the paper his own by his neglect? Contradictory as these rules are, they have yet each their share of authority, and are just and wise when applied to other questions; but I am not satisfied with the equity in the commercial policy of either, when applied to a collecting agency, and I have sought in the decisions for some safer and more equitable doctrine on that head.

Considering the subject in regard to commercial policy, there is, on one side, the vast amount of paper daily collected through our banks, the great public necessity for giving every facility and inducement to such collections, the serious drawback on those facilities and inducements that would be occasioned, and the opportunity of fraud afforded if worthless paper deposited for collection can, whenever parties are discharged by the blunder of a clerk, be saddled irrevocably on responsible agents and "made their own" absolutely and without allowing any defense or mitigation of damages. On the other hand, the policy of holding such agents to strict accountability is equally clear. Our whole system of negotiable paper and its responsibilities, formed, as it is, by long experience, and admirably adjusted to the varied uses of commerce, rests upon the single principle of strict punctuality in demands, presentments, and notices

as well as in payments. Now the policy and necessity of that punctuality, apply with the same force to the agent of such paper that they do to the principal. I can, therefore, find no sounder rule of damages, nor one better protecting and reconciling all these claims of policy and justice, than that pointed out by the decisions in a large class of cases of agency, and by the analogy of the measure of damages in trover. In those cases, the presumption is, in the first instance, to the full nominal amount of the loss, as it appears on the face of the transaction against the agent wanting in diligence, or the party guilty of the tortious conversion. Thus where an agent or factor neglects to insure for his principal, according to order, he is held responsible for the default, *prima facie*, to the total amount which he ought to have covered by insurance. But at the same time he is allowed to put himself in the place of the underwriter, and to prove fraud, deviation, or any other defense which would have been good, had the insurance been made, or which would go to show that nothing at all, or how much, was actually lost by the neglect: *Delancy v. Stoddart*, 1 T. R. 22; *Wallace v. Telfair*, 2 Id. 188; *Webster v. De Tastet*, 7 Id. 757.¹ In the courts of this state, *Randle v. Moore*, 3 Johns. Cas. 36. And in the courts of the United States, *Morris v. Summeril*, 2 Wash. 203. See also 1 Ph. Ins. 521, and the cases there cited. So, too, in actions against sheriffs, where those official public agents become chargeable with the debt of another, by their own negligence or misconduct. When the default is established, the amount due the plaintiff in the original suit, is the *prima facie* evidence of the measure of damages. This presumption may be controlled or rebutted, and the sheriff may give in evidence any fact, showing either that the party has not been actually injured, or to a much less amount. He may show, for instance, the insolvency of the original debtor. But the burden of proof is upon him; if he leaves the presumption uncontradicted, that establishes the measure of damages. This has been frequently ruled at our circuits, nor can I find that it has ever been questioned in our supreme court, and is substantially recognized in *Potter v. Lansing*, 1 Johns. 215 [3 Am. Dec. 310]; *Russell v. Turner*, 7 Id. 189 [5 Am. Dec. 254]. The Massachusetts decisions are particularly full and express on this very point: See 10 Mass. 470;² 11 Id. 89;³ Id. 188;⁴ 13 Id. 187.⁵ Similar decisions may be found in the reports of other states. So again in trover. In *Ingals v. Lord*, 1 Cow. 240, in trover for

1. 1 T. R. 187.

2. *Weld v. Bartlett*.3. *Young v. Hooper*.4. *Nye v. Smith*.5. *Shackford v. Goodwin*.

a note, it was held, that the *prima facie* measure of damages was the face of the note; but that evidence might be given to reduce the amount, by proving payment in part, or the insolvency of the maker, or any other fact invalidating the note or lessening its value.

It is true, that Lord Tenterden, in *Van Wart v. Woolley*, above cited, held that damages must be shown, and that the face of the bill is not the conclusive measure; but this I think is not in contradiction to the view that I have taken. I therefore take the cases before mentioned to point out the sound doctrine here. The face of the bill is the *prima facie* measure of damages. These may be reduced by any positive evidence proving the real damage to be less; but the burden of that proof must be upon the negligent agent, and not on the party who suffers by his negligence. Circumstances like those of the present case, may often render it difficult or impossible for either party to prove or even to form a probable estimate of the precise damages incurred by the agent's neglect. In such cases, is it not just that those chances of loss which must fall upon one or the other, should be thrown upon the party in default, and not upon the innocent sufferer? It was, then, for the defendants here to show that the debt would not have been paid had due diligence been used, or that there were any other circumstances to diminish the actual damages below the nominal amount. I do not see that this was done, and therefore think that Chief Justice Jones was right in his charge: "That the court and jury having no knowledge what the amount of damages was except from the proof of the amount of the draft, the jury should find for the plaintiffs for the amount of the draft, and interest from the day it became due." Perhaps the case was a hard one. So are many others that arise under our law of negotiable paper, in consequence of laches of parties. In all such instances, the hardship of the particular case must yield to the necessity of adhering to some general rule founded on broad considerations of public policy. I can find no such rule safer or more conducive to commercial convenience, or sanctioned by stronger authority, than the one I have stated.

If, however, we abandon this rule, the only alternative, in my judgment, so far as authority governs, is to adopt the stricter doctrine of our supreme court, in *Le Guen v. Gouverneur and Kemble*, 1 Johns. Cas. 467 [1 Am. Dec. 121], and affirmed in 1800, in this court: "That where the property consists of credits, the agent whose breach of orders causes damages, is bound to answer

to the amount of the credits, and the principal may abandon to him." The only defense distinctly recognized as valid in those doctrines, is that of fraud, or some similar one going to invalidate the whole contract. Upon this principle, the agents here would be held to have made the paper their own by their default, if the plaintiffs below thought fit to abandon it to them; and this, perhaps, is the ground on which the superior court rested their decision in this case; the reasons of which I regret that we have not before us. Under the circumstances of the case, either this rule or that which I have stated before, would affirm the judgments of the courts below; but I place my own vote for affirmance upon the ground first stated, as being the most equitable, the most conducive to public policy, and as supported by the analogy and authority of many modern decisions.

On the question being put, Shall this judgment be reversed? the members of the court divided as follows: Twenty in the affirmative, and four in the negative. Whereupon the judgments in the courts below were reversed, and a *venire de novo* directed to be awarded by the superior court.

In the rule for judgment of reversal, the following entry was made: "It is further ordered and adjudged, that an agent who receives a bill of exchange for collection which has not been accepted, is bound to present the same for acceptance without unreasonable delay, as well as to present the same for payment when it becomes due, or he will be liable to his principal for the damages which the latter sustains by such negligence."

AN AGENT INTRUSTED WITH THE COLLECTION OF A BILL must see it presented for acceptance, and that the proper protests and notices are given, in case of its dishonor: *Allen v. Merchants' Bank of New York*, 22 Wend. 225; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 461.

WHERE THE NEGLIGENCE OF AN AGENT HAS CAUSED THE LOSS OF THE security of the liability of an indorser, the agent will be liable to his principals for the full amount of the note, unless he can prove affirmatively that the indorsers whom he has failed to charge were insolvent: *Coghlan v. Dinmore*, 9 Bosw. 463. And where a person fails to take proper means to collect an amount, the collection of which he has undertaken, he will be liable *prima facie* for the whole amount of the security representing the debt, though he may reduce the amount of his liability by showing the security worthless: *Hoard v. Gardner*, 3 Sandf. 179. Upholding the same rule, that is, that the burden of proof to show that a security lost by the negligence of an agent was without value, is upon the agent, are, *Morange v. Mix*, 44 N. Y. 315; *Bridge v. Mason*, 45 Barb. 40; *Bryant v. American Telegraph Co.*, 1 Daly, 590; *Booth v. Powers*, 56 N. Y. 29; *Ayrault v. Pacific Bank*, 1 Abb. (N. S.) 384. But where an agent intrusted with the collection of a draft failed to give notice to his principals of its non-payment, it was held, that before these should be entitled to more than nominal damages, they must show that, had notice

been given them, they would have been enabled to collect the draft, or some part of it.

WHERE AN AGENT EMPLOYED to settle or arrange certain claims receives notes in satisfaction, his sale of the same, though for less than their face, will render him liable to his principal for their full nominal value, upon its being shown that the notes were good and collectible: *Allen v. Brown*, 44 N. Y. 228, all citing the principal case.

COCHRAN ET UX. v. VAN SURLAY.

[20 WENDELL, 365.]

ACT OF THE LEGISLATURE IS INVALID if it, in effect, divests an individual of his property without compensation.

LEGISLATURE, AS PARENS PATRÆ, MAY PRESCRIBE SUCH RULES as it deems proper for the superintendence, management, and disposition of the property of infants, lunatics, and other incompetent persons. This power can not be so extended as to authorize a transfer, except where it can legally be presumed that the owner would have assented to the transfer if in a situation to act for himself.

SPECIAL ACT OF THE LEGISLATURE AUTHORIZING THE SALE OF THE PROPERTY OF MINORS, to provide funds for their education and maintenance, is not unconstitutional.

SPECIAL ACT OF THE LEGISLATURE may discharge existing trustees and vest their estate in new trustees to be appointed by the court of chancery; may convert an equitable life estate into a legal estate, and may authorize this tenant of the life estate to sell and convey the estate in fee, with the assent of the chancellor, where the estate in remainder is vested in the minor children of this tenant for life.

WHERE THE CHANCELLOR HAS JURISDICTION, an error committed by him in its exercise can not render his action void.

EJECTMENT by Isabella Clarke. After verdict, she married R. J. Cochran. The action, in its later stages, was in their joint names. She claimed under the will of Mary Clarke. By this will, dated April 6, 1802, the testatrix devised certain lands to Thomas Byron, Benjamin Moore, and two others, in trust: 1. To receive the rents and profits, and pay them to Thomas B. Clarke, during his natural life; 2. After the death of said Thomas B., to convey to his lawful issue in fee; 3. If he should have no lawful issue, to convey to Clement C. Moore, grandson of testatrix. Thomas B. Clarke had three children. During his life, three acts of the legislature were passed regarding this property. The first was passed in 1814, upon the petition of Thomas B. Clarke, with the concurrence of the trustees, and of Clement C. Moore. It authorized the partition of the property into two parts, one of which was to be subdivided into lots and sold, together with the house occupied by Byron, and the proceeds in-

vested in stocks and real securities to create an income for the benefit and support of Thomas B. Clarke and his family and children, the principal, after his death, to be paid according to the trusts in Mary Clarke's will. The second act was passed in 1815. It recited that C. C. Moore, the contingent remainderman, had conveyed to Thomas B. Clarke. It empowered Clarke to do every act regarding the property which the act of 1814 had directed might be done by trustees appointed by the chancellor. No sale was to be made by Clarke without the assent of the chancellor. The proceeds were to be invested and an annual account of the principal rendered. The interest Clarke could apply to his own use and for the education and maintenance of his children. In 1815, after the passage of this last act, the chancellor made an order assenting to the sale of a moiety in Greenwich, and of the house and lot occupied by Byron; and directed that the proceeds of the sale be applied to paying debts then owing by Clarke, and to be contracted for the necessary support of his family, and the residue placed at interest, which interest should be applied to the support of Clarke and family, and the education and maintenance of his children; and the principal should be held for the benefit of such of his issue as should survive him. A third act was passed in 1816, whereby Clarke was authorized under the order of the chancellor already made, or any order to be thereafter made, to sell such premises as the chancellor had authorized or might authorize to be sold, and the proceeds were to be applied as directed by the chancellor under said acts theretofore passed. In March, 1817, a further order, made by the chancellor, authorized Clarke to sell the southern part of the lands in Greenwich, or to mortgage any part thereof, if in his judgment that would be more beneficial than selling; also authorizing him to convey any part or parts thereof in satisfaction of debts due from him, such mortgage or sale to be approved by one of the masters in chancery, and such approval to be indorsed on the conveyance or mortgage. Thomas B. Clarke conveyed thirty-nine lots, including the premises in dispute, to George De Grasse, for two thousand dollars, August 2, 1821. On this deed the certificate of the master's approval was indorsed, dated March 5, 1832; but this certificate was excluded from evidence. March 28, 1822, De Grasse sold and conveyed the thirty-nine lots and four others to defendant for two thousand two hundred dollars. This action was brought by one of the children and heirs of Thomas B. Clarke, who died in 1826. Verdict was entered by plaintiff by

consent, subject to the opinion of the supreme court. That court gave judgment for defendant. Plaintiff sued out a writ of error.

D. B. Ogden, for the plaintiffs in error.

J. Anthon, *contra*.

WALWORTH, Chancellor. In the examination of this case, it is proper to take into consideration the fact that we are acting as a court of law, and are endeavoring to ascertain whether the legal title to the premises is in the plaintiffs; for if it is not, then they can not recover in this suit, whatever may be their equitable rights as against this defendant or any other person; and if the legislature had the right to pass the acts in question, then it will not be necessary to inquire whether the original trustees were guilty of a breach of their duty in consenting to improvident acts of legislation, in consequence of which the rights of these complainants may have been sacrificed. On the other hand, if the acts are unconstitutional and void, it is not in the power of this court, in an ejectment suit, to inquire whether the defendant has an equitable lien or claim upon the premises for the purchase money which has been applied to the support and education of Mrs. Cochran during her minority, or for any buildings or improvements which have been made upon the premises in good faith, under the supposed title acquired under the acts of the legislature and the orders of the court of chancery. The two questions proper for consideration in this suit, therefore, are: 1. Whether the legislature exceeded its constitutional powers in passing the acts of the first of April, 1812, the twenty-fourth of March, 1815, and the twenty-ninth of March, 1816; and, 2. If those acts were constitutional, whether they have been carried into effect, under the orders of the court of chancery, so far as to vest the legal title in the grantee of Thomas B. Clarke, under whom the present defendant claims.

If the laws are unconstitutional, it must be either because they impair the validity of a contract, and thus conflict with the constitution of the United States, or because they are inconsistent with the state constitution, in taking the property of infants and applying it to purposes not previously authorized by law, and which could not benefit them. There is not any contract which has been violated in this case by the legislature, within the meaning of that clause of the constitution of the United States which prohibits the state legislatures from passing any laws impairing the obligation of contracts. In the case of *Fletcher v.*

Peck, 6 Cranch, 87, the supreme court of the United States decided that this prohibition in the constitution applied as well to rights vested under executed contracts as to rights under such as were executory merely; and that the act of the legislature of the state of Georgia, which attempted to divest the title to land which had been vested in the grantees of the state, under the power conferred upon the governor, as its agent, by virtue of a previous act authorizing such grant, was therefore unconstitutional as to *bona fide* purchasers who had acquired a legal title to the land under that grant. The language used by Chief Justice Marshall in delivering the opinion of the court in that case, has been supposed, by some, to mean that every right vested in an individual or body corporate was in the nature of a contract executed; and therefore within the protection of this clause of the constitution; and certainly the strong language used by him, in that case, is calculated to convey that impression, if his language be not carefully examined and applied to the case then under consideration. But that impression is entirely removed when we refer to a subsequent decision of the same court, pronounced by another of its members, but while that distinguished judge still occupied his seat on the bench.

In the case of *Satterlee v. Matthewson*, 2 Pet. 380, which came before that court in 1829, on a writ of error to the supreme court of the state of Pennsylvania, the question arose whether a legislative act of the state changing the law, as it had been declared settled by the highest judicial tribunal of the state, in a suit between the same parties, was not, as to the party who had acquired rights under such decision of the court, a violation of this provision of the United States constitution. The supreme court of the United States there decided that the provision of the constitution did not extend to vested rights which were not thus vested under a contract, the obligation of which was impaired or destroyed by the state law. In delivering the opinion of the court, in that case, Mr. Justice Washington says: "The objection, which was most strongly pressed upon the court, and relied upon by the counsel for the plaintiff in error was, that the effect of this act was to divest rights which were vested by law in *Satterlee*. There is certainly no part of the constitution of the United States which applies to a state law of this description; nor are we aware of any decision of this court, or of any circuit court, which has condemned such a law upon this ground, provided its effects be not to impair the obligation of a contract, and it has been shown that the act in question has no such effect

upon either of the contracts which have been before mentioned. In the case of *Fletcher v. Peck*, it was stated by the chief justice that it might well be doubted whether the nature of society and of government do not prescribe some limits to the legislative power; and he asks, if any be prescribed, where are they to be found if the property of an individual, fairly and honestly acquired, may be seized without compensation? It is nowhere intimated in that opinion that a state statute which divests a vested right is repugnant to the constitution of the United States." After this decision of the court of *dernier ressort*, upon a question as to the construction of the federal constitution, it would be improper for us, even if we should differ with that court in opinion, to declare the acts of the legislature in question in the present case void, on the ground that they were repugnant to that provision of the constitution of the United States.

But, as I have frequently had occasion to observe, an act of the legislature which would have the effect to divest an individual of his property and transfer it to others for their own benefit, without compensation, or where there was no reason to suppose the person whose property was thus taken would be benefited thereby, and contrary to the settled principles of law, would be void, as being against the spirit of our state constitution, and not within the powers delegated to the legislature by the people of this state. It is clearly, however, within the powers of the legislature, as *parens patriæ*, to prescribe such rules and regulations as it may deem proper for the superintendence, disposition, and management of the property and effects of infants, lunatics, and other persons who are incapable of managing their own affairs. But even that power can not constitutionally be so far extended as to transfer the beneficial use of the property to another person, except in those cases where it can legally be presumed the owner of the property would himself have given the use of his property to the other, if he had been in a situation to act for himself—as in the case of a provision out of the estate of an infant or lunatic, for the support of an indigent parent, or other near relative. Testing the legislative acts in question by these rules, I can not see that they infringe either upon the letter or the spirit of the state constitution, so far as the rights of the children who were in existence at the time of the passage of those acts were concerned. It is true that by the terms of Mrs Clarke's will, the children of T. B. Clarke, then in existence, had only a contingent interest in the remainder of the estate after his death; or rather, it was a vested remainder, subject to open

and let in after-born children, and which was liable also to be divested by the death of the children during the life-time of their father. It was, therefore, contrary to the settled principles of law to authorize a sale of the contingent interests of persons not then in existence, for the purpose of providing a maintenance for those who might not eventually be entitled to any interest in possession in such remainder.

But it is a settled rule of the court of chancery, that where a future estate or interest in property is given to several infants as a class, with the right of survivorship as between themselves, a provision for the maintenance of each may be allowed out of the fund, although, as in this case, it may eventually be found that some of them do not become entitled to an interest in the fund in possession, and that the whole belongs to the survivors. The principle upon which the court proceeds, in such a case, is, that although it may eventually turn out that some of the children may not be entitled to any portion of the fund, yet, as the chances of survivorship are equal, no injustice can be done to either, by providing for the present support of all out of a fund which presumptively belongs to all in equal proportions. But where, by the provisions of the conveyance or will, under which the property or fund is held, other persons may eventually be entitled to such fund or property, it can not be taken and applied to the support of those who are presumptively entitled to the same, without the consent of those who may become entitled to the same under such contingent limitation: *Ex parte Kebble*, 11 Ves. 604; *Canning v. Flower*, 7 Sim. 523. And where the contingent limitation over is to persons not in existence, or whose consent can not be obtained, the fund can not be appropriated for the support of those who are only presumptively entitled to the same, and whose interest therein may never vest in possession: *Errat v. Barlow*, 14 Ves. 202; *Turner v. Turner*, 4 Sim. 430.

For this reason, the chancellor was not authorized to direct a sale of the interest of the children of T. B. Clarke in the property in question, for their maintenance and education, under the general act concerning infants (Laws of 1814, 128), unless the purchaser was willing to take the title, subject to the contingent rights of other persons who might eventually become entitled to an interest in the premises under the limitations in the will of Mrs. Clarke; and as the value of such contingent interests could not be ascertained by any known rule of compensation, the chancellor would not authorize a sale, unless the purchaser would pay the full value of the property subject to the

father's life estate, and without reference to such contingent interests. For the same reason, the legislature probably could not by these special acts authorize a sale of the property, so as to affect the contingent rights of persons not then in existence, who might thereafter become entitled to the same, under the limitations in the will. Were the rights of any such persons now in controversy in this cause, there might be some reason to doubt the constitutionality of these acts of legislation, so far as those rights were affected thereby; but, as in the event which has occurred, no persons, except three of the children who were in existence at the time these acts were passed, became entitled to any interest in the remainder limited upon the life estate of T. B. Clarke, those children can not legally complain that the legislature passed laws which might have been unconstitutional as to other persons, in a different event.

In testing the constitutionality of these acts in reference to the rights of the plaintiffs in error, the case is to be considered in the same light as if the limitation of the remainder had originally been to the six children in fee, with a right of survivorship in favor of such of them as should be living at the termination of the life estate of their father; in which case, as we have before seen, the court of chancery might apply a fund in which all had an equal interest, presumptively, for the common and equal benefit of all. Indeed, it is a settled principle, that whenever the property of infants consists of real or personal estate, the legal title to which is in trustees, the chancellor, as the general guardian and protector of the rights of all infants, may authorize such a disposition thereof, as he in the exercise of a sound legal discretion, may deem most beneficial to such infants, provided the rights of other persons are not prejudiced thereby. The only restrictions upon that power are those which the court has from time to time imposed upon itself, in the nature of general rules to regulate the exercise of such discretion, and those imposed by certain provisions of the revised statutes rendering trustees incapable of transferring the title to trust estates, in contravention of the trust expressed in the instrument creating such estates. The same power is given to the chancellor over the legal estates of infants by the several acts in relation to the sale of infants' estates, subject, however, to the limitation imposed by the legislature, that such estates shall not be sold or disposed of contrary to the provisions of the will or conveyance, by which the estate was devised or granted to the infant. It seems therefore to follow, as a necessary consequence, that the

legislature must have the constitutional power to pass special laws authorizing similar dispositions of the estates of infants for their benefit, either with or without restriction, where an infant or class of infants is entitled to the whole beneficial interest in the property, especially where such disposition is directed to be made under the superintending control of the court of chancery.

I do not find anything in the special verdict to justify the allegations of counsel, that these acts were not for the benefit of the infants, but for the benefit of T. B. Clarke merely. As the father, where he is of sufficient ability, is bound to support his infant children, if it had been found by the special verdict that T. B. Clarke had ample means for that purpose, then it certainly could not have been for the interest of the infants that their future estate in the property should have been sold and applied to that use, and the trustees, in that case, would probably have been guilty of a breach of trust in consenting to the passage of an act of the legislature authorizing such a sale, in case the infants eventually sustained any damage in consequence thereof; but it is stated in the act of April, 1814, that it appeared to the legislature that the property devised to the trustees was nearly unproductive, and that in its then situation it was incapable of being improved, so as to yield an adequate income for the support of T. B. Clarke and his family, whereby the intentions of the testatrix would be defeated without the interposition of the legislature; and this statement must be taken as true, until the contrary is found to be the fact. It is a matter of public notoriety, that a life estate in vacant city lots is of comparatively little value, and frequently is not equal to the taxes and extraordinary assessments charged thereon. We may therefore readily imagine that the owner of such an estate was unable to support himself and wife, with six children, out of the income thereof, and that he might be compelled to incumber his life estate to furnish the means of support. The act of 1814, therefore, appears to have been a very proper exercise of the legislative power, and the accumulating fund provided for by the third section of the act, I presume, afforded an ample equivalent for the part of the future estate of the children which was taken for the immediate support of themselves and their parents. By that act the trustees were discharged, and the legal title to the premises was to vest in the new trustees to be thereafter appointed by the court of chancery. By the first section of the act of March, 1815, the equitable life estate of T. B. Clarke in the premises was con-

verted into a legal estate, which was perfectly proper, as its conversion from an equitable to a legal estate could not possibly affect the rights or interests of any other person. And although it might not have been a discreet act of legislation to vest the legal title of the residue of the trust estate in T. B. Clarke, as is done by the operation of the second section of that act, no one can say it would have been an unconstitutional exercise of power, even if his general powers, as trustee for his infant children, had not been expressly restricted by the superintending power and control of the chancellor, and by requiring the assent of that officer to any sales to be made.

But it is supposed that the act of March, 1816, is liable to the constitutional objection that it sanctions the order of the chancellor which appropriated the proceeds of the children's property to pay off debts of the father, and which were not contracted for their benefit. I can not perceive, however, that the order is liable to that objection. It is true the mortgage to the Manhattan company, given in 1805, could not have been given for a debt incurred for the support and maintenance of children who were born long afterwards; but it must be recollected that T. B. Clarke had himself a life estate in the whole premises, which might legally and properly be taken for the purpose of paying the debts then due to his creditors, although no part of those debts were contracted for the support or education of his infant children; and unless such debts exceeded the value of his life interest in the premises, it was not improper to direct them to be paid out of the proceeds of the sale of the premises; as the proceeds of the life estate of the father could not be taken and appropriated for the support of his children, to the prejudice of the rights of creditors who had a prior claim to his property. The jury have not, by their special verdict, found that the order of the chancellor had the effect to take the proceeds of their future interest in the property, and to apply the same in payment of the father's debts, without giving to them a corresponding benefit, in the support which they thereby obtained out of the income of his life interest in other parts of the property; we therefore can not presume that the court of chancery made an order which would produce that result, or that the legislature intended to authorize or sanction such an order.

If the chancellor, in the exercise of a proper power confided to him by the legislature, for the purpose of protecting the rights of those who were infants and incapable of taking care of their own rights, has not exceeded his jurisdiction, but has

merely erred upon the question whether such sale as he authorized would eventually be for their benefit, Justice Bronson, who delivered the opinion of the supreme court, was clearly right in supposing that the decision of the court of chancery could not be reviewed in this collateral way. By the act of 1815, Clarke was authorized to sell and convey the legal title and the beneficial interests of the children in the remainder, as well as his own life estate in the premises, with the assent of the chancellor; and if that assent was given to the sale to De Grasse, those claiming under the conveyance to him have a valid title to the premises in question, which certainly can not be disturbed at law.

The only doubt I have had in this case, was upon the question whether, by the order of the fifteenth of March, 1817, the chancellor did not intend to require every sale for cash to be approved by a master, as well as sales or conveyances which might be made by the trustee in payment or satisfaction of debts. Upon this point, I concur, though with some hesitation, in the conclusion at which the justices of the supreme court arrived, that the restriction was only intended to apply to sales and conveyances in satisfaction of debts at a valuation to be approved of by a master, according to the prayer of the petition, upon which that order was founded. The legal title to the premises in this case, therefore, passed to the purchaser thereof for cash, although the conveyance from Clarke, as the substituted trustee under the statute, was not approved of by a master, as it should have been if the property had been conveyed to a creditor of the trustee in discharge of a debt due from the latter.

For these reasons I shall vote for an affirmance of the judgment of the supreme court.

VERPLANCK, Senator. The first ground upon which the plaintiffs in error seek to avoid the sale made by Clarke under the several acts of the legislature, is their alleged unconstitutionality: 1, as against the former constitution of this state, under which they were passed; and 2, as repugnant to the provisions of the constitution of the United States which inhibits every state from passing any law impairing the obligation of contracts. I concur with the supreme court in supporting the constitutionality of the acts under which the sale, now impeached, was made. The first two acts, certainly and clearly, and the third one upon the face of it, and as far as a natural and obvious construction would carry it, go no further than the exercise of that paternal power over the persons and property of infants, which under the common law was an inherent right of sovereign

power, and may be exercised either by general laws or, under peculiar circumstances, by special legislation. The chancellor has, without the aid of positive legislation, a large jurisdiction over the property of infants, to be exercised for their benefit; and this jurisdiction, as was said by Lord Chancellor Hardwicke, in *Buller v. Traver*, Ambler 302, "is a general right delegated by the crown, as *pater patriæ*, to interfere in particular cases for the benefit of such as are incompetent to help themselves." This doctrine, I know, has been recently called in question, but certainly without good reason, since Lord Redesdale, adding his own high authority to that of the long succession of English chancellors, says, "Lord Chancellor Somers, Lord Chancellor Northington, Lord Chancellor Hardwicke, and every other chancellor, has placed the jurisdiction on that ground." Whilst our own Judge Story thus sums up the discussion: "The doctrine now maintained is, that the general superintendence and protective jurisdiction of the court of chancery, over the persons and property of infants, is a delegation of the rights and duties of the crown:" 2 Story Com. Eq. L. 565. The same power, then, which the sovereign authority has a right to delegate generally, it may certainly exercise specially in the discretion of its officers; for the authority is not judicial, but rather parental or tutelary. The same constitutional authority which empowered our state sovereignty to pass general laws for the management of infants' estates, such as have been heretofore enacted, and now form in another shape, a part of our revised code, could not but be competent to legislate for a particular case in which there occurred the same difficulties; which becoming more common, were afterwards more widely guarded against by laws of universal application. They contemplated only a change of unproductive real estate into productive personal property, the income of which was to be applied to the benefit of all interested therein. The last act authorized Clarke to sell the property, with the permission of the chancellor, and to apply the proceeds "to the purposes required or to be required by the chancellor under the former acts." The chancellor had already authorized the application of a part of the proceeds to the payment of Clarke's former debts. This order seems to me repugnant not only to the letter and intention of the devise, but also to the former acts, and in derogation of the rights of the infants. I should therefore think that it was not confirmed by the third act, which did not recite or confirm, *eo nomine*, any particular order, but looked only to orders in conformity with, or "under the acts heretofore passed"

on this subject, both of which limited the application of the money to the support of Clarke and his children, from the interest only. If this construction be correct, there can be no question as to the constitutionality of the acts, and the question will be as to the conformity of the orders with them.

But the words of the third act may admit of a broader construction, and such an one the chancellor appears to have given to them at the time of his last order. They may, perhaps, be construed as confirming expressly the order before granted, whether in conformity with the former acts or not, and thus authorizing the application of the principal of monies, which those acts reserved for the ultimate benefit of the children, to the payment of past debts of the father. This, however unwise or unjust it might have been, would not, in my view, shake the constitutionality of the act itself, according to the old constitution of 1776, under which it was passed. The only clause in that constitution which is alleged to bear upon the question, is that which declares that "no member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to the subjects of this state by this constitution, unless by the law of the land or the judgment of his peers." I must say with Mr. Justice Bronson (even taking the operation of the act most strongly, as depriving the infants of a portion of their property), that I can not see that they are deprived of any right expressly secured to them under that constitution. It is difficult, upon any general principles, to limit the omnipotence of the sovereign legislative power, by judicial interposition, except so far as the express words of a written constitution give that authority. There are indeed many dicta and some great authorities, holding that acts contrary to the first principles of right are void. The principle is unquestionably sound as the governing rule of a legislature, in relation to its own acts, or even those of a preceding legislature. It also affords a safe rule of construction for courts, in the interpretation of laws admitting of any doubtful construction, to presume that the legislature could not have intended an unequal and unjust operation of its statutes. Such a construction ought never to be given to legislative language, if it be susceptible of any other, more conformable to justice; but if the words be positive and without ambiguity, I can find no authority for a court to vacate or repeal a statute on that ground alone. But it is only in express constitutional provisions, limiting legislative power and controlling the temporary will of a majority, by a permanent and paramount law, settled by

the deliberate wisdom of the nation, that I can find a safe and solid ground for the authority of courts of justice to declare void any legislative enactment. Any assumption of authority beyond this, would be to place in the hands of a judiciary, powers too great and too undefined, either for its own security or the protection of private rights. It is, therefore, a most gratifying circumstance to the friends of regulated liberty, that in every change in their constitutional polity, which has yet taken place here, whilst political power has been more widely diffused among the people, stronger and better-defined guards have been given to the rights of property. Thus in the constitution of the United States, the states have been inhibited from passing any law impairing the obligation of contracts, a power boldly, rashly, and wantonly exercised under the old confederation. So again, in the constitution of our own state, adopted in 1822, in addition to the general provision of the old constitution already quoted, "that no one shall be deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers," farther protection is given to property, by adding a prohibition against "the taking private property for public use without just compensation," and also another against "the depriving any one of life, liberty, or property, without due process of law.," i. e., by mere arbitrary legislation, under whatever pretext of private or of public good.

Believing that we are to rely upon these and similar provisions as the best safeguards of our rights, as well as the safest authorities for judicial direction, I can not bring myself to approve of the power of courts to annul any law solemnly passed, either on an assumed ground of its being contrary to natural equity, or from a broad, loose, and vague interpretation of a constitutional provision, beyond its natural and obvious sense. There is no provision of the old state constitution, that, in my understanding of it, so limits the power of the legislature over the property of its citizens, as to enable a court to set aside these statutes, or titles acquired under them, on the ground of unconstitutional enactment. The words of our present constitution are stronger, and under them the result might be different. Nor can I consider the clause of the constitution of the United States inhibiting any state from "passing any law impairing the obligation of contracts" as bearing upon these acts. I am well aware that the language and reasoning of Judge Story, in his justly celebrated opinion in the great Dartmouth college cause,¹ gives an extension to the meaning of the word contract,

1. 4 Wheat. 512.

which might perhaps authorize its application to a case like that before us. Such, however, is not the doctrine of Chief Justice Marshall, or of his brethren, nor do any of the decisions of the supreme court of the United States under this head of constitutional law, rest upon or involve so latitudinarian a meaning. I can not consider the word contract as applying to such a transaction as that upon which the plaintiffs here rest their title, without giving to it an extent of meaning wholly unwarranted by any legal or even any colloquial usage. A contract necessarily implies some reciprocity between the parties; some mutuality of compact between them. But a will absolute in its terms, and unconditional, can not, by any stretch of terms within the limits of legal or of ordinary language, be termed a contract; still less can an estate absolutely vested under a decree; or if contingent, yet contingent only on the casualties of life, not on any condition to be performed, be considered as an executed contract. If such interpretation be allowed, there can be scarcely any state legislation which will not be in danger of being impeached and set aside for unconstitutionality, as touching something that has at some past time or other been the subject of an executed contract. Viewing, as I do, this provision of our federal constitution and the series of wise and salutary decisions under it, as forming the most important safeguard of the rights of industry and labor possessed by the American citizen, I hold that sound political wisdom, not less than correct legal interpretation, should forbid us to press the words of the constitution beyond their original obvious and settled meaning; and thus to make that prudent and useful check upon legislative indiscretion, odious to the people, by seeking to cover with it the whole of state legislation, and embarrassing its most ordinary and most beneficial operations. Under any view of the private acts in question, I conclude that they were within the constitutional legislative authority; censurable, perhaps, for want of due caution, but not impeachable for usurpation of power.

The next points of inquiry are, whether the orders of the chancellor empowering the sale by Clarke were not void for want of conformity with the statutes; and if they did not conform to the acts, whether the sale under them was not a nullity?

I have already intimated my strong impression (at least as at present advised) that the orders were not in conformity with the acts, and that the third act still confined the chancellor to allow no other application of the proceeds of the sale than was valid under the "acts heretofore passed." But, nevertheless, I am of

opinion that the orders were so far valid as to protect a *bona fide* purchaser at a sale made in conformity with them, and to bestow upon him a legal title not to be impeached in a court of law. Beyond this, I can not go, nor does the case demand it. The order made under the first two acts, was in contravention of the statutes, so far as it allowed a part of the proceeds of the sale to be applied to the payment of Clarke's former debts; nor do I think that the words of the act of 1816, ratified the former words or extended the chancellor's powers in future orders as to the liberty of applying the principal of those funds, of which, according to the "acts heretofore passed" on the subject, the interest only was to be expended. But Clarke was clearly and directly empowered under the second and third acts to sell the property, after being permitted by the chancellor, or having procured his assent. If, then, he procured the chancellor's assent to the sale, however erroneous the order granting that assent might have been as to the application of the proceeds of the sale, I can not see how the title acquired under such a sale is to be impeached in a court of law, on the ground of erroneous application of the proceeds. The question of application belongs to the peculiar jurisdiction of equity, and can not be judged collaterally in a court of law, so as to overthrow indirectly and consequentially a legal title connected with it. The old equity doctrine of application, which required purchasers from trustees to look to the application of the moneys paid by them at the hazard of losing the estate, or paying the consideration twice over, was long ago allowed to be hard and unjust, and recently has been weakened by repeated decisions limiting its extent or explaining away its force; "equity struggling, as has been well said, against its own inequitable rule." In this state, the recent revision of our laws has expunged the rule from our system. This legislative alteration, however, can not, as such, affect the present case. But in its largest and most unrestrained acceptance, this rule could never have been carried so far as to make the *bona fide* purchaser's estate, not only dependent upon his seeing that the proceeds of the trust fund went to the person or purpose held out by the court as entitled to receive it, but, moreover, further dependent upon the right judgment of the court in its decision or its order as to the proper person or purpose entitled to such beneficial interest. Such a distinction would have gone very far to make every sale under the authority of chancery, doubtful and hazardous.

What Lord Redensdale has said, in reference to the effect of a

decretal order, may, for the same reason, be extended to all sales under the authority of the court. "The general impression of all the cases on this head is, that the purchaser has a right to presume that the court has taken the steps necessary to investigate the rights of parties, and that it has on investigation properly decreed a sale:" 1 Sch. & Lef. 597.¹ Whether or no the purchaser's title under such a sale must be protected absolutely and conclusively, both at law and in equity, or (as I rather think) whether equity might not review the whole transaction and vacate the sale on the return of the purchase money, so as to protect only against actual loss, I am not prepared to say, nor are we called upon to decide. But as the difficulty arises from error in a court of equity, it is in equity alone that the remedy must be sought. Merely to vacate the sale and invalidate the title acquired under it, in a court of law, would be but to inflict an additional and inequitable hardship upon a new party, by attempting to shift the loss from one innocent sufferer to another, even if that power were within the competence of a court of common law. But it is not within such jurisdiction. All these private acts clearly and unequivocally give the right to sell the real estate with the permission of the chancellor; and that authority of sale seems to me good in law, whatever may have been the judicial error in directing the subsequent application of the proceeds. If such error has occurred, and if it can be corrected at all at this period, it is to be corrected only by equity reviewing its own orders either in the same or a higher court, and adjusting the loss among the several sufferers in their just ratio. I have thus far been led to the very same conclusions on the points under examination with the supreme court, by a course of reasoning somewhat different from theirs, though not in contradiction to it. On the last point I am compelled to differ altogether from their decision.

The sale and conveyance under which the defendant claims title, are impeached as wholly void, because not made in conformity with the express directions of the chancellor in his order. I can not but consider this objection fatal to the legal title of the defendant, as it now stands. By those acts, as was justly said by the then chancellor, in a case arising under them, "the chancellor was virtually made the trustee of the property:" *Sinclair v. Jackson*, 8 Cow. 543; and no sale, mortgage, or conveyance was valid without his express assent or permission. In his order of March, 1817, he directs in three successive sentences: 1: That

1. *Giffard v. Hort*, 1 Sch. & Lef. 397.

Clarke be authorized to sell certain property therein described; 2. That he be authorized to mortgage said property; and 3. "The said Clarke is further authorized to convey any part thereof in payment or satisfaction of any debt due from him, on a valuation to be agreed upon between him and his creditors, provided, nevertheless, that every sale and mortgage, and conveyance in satisfaction, that may be made by the said T. B. Clarke in virtue thereof, shall be approved by one of the masters of this court, and that a certificate of such approval be indorsed upon any deed or mortgage that may be made in the premises." Here the words sale, and mortgage, and conveyance in satisfaction, refer directly to the several authorities successively granted to sell, to mortgage, and to convey; whilst, again, the words "deed or mortgage" must be referred to all the prior sentences, or the word "mortgage" has no effect at all. So Clarke was nowhere authorized to mortgage in satisfaction of debt. For all these powers the approval of a master is necessary, or the power is not granted.

Judge Bronson, in pronouncing the opinion of the supreme court, rests the decision of this part of the cause upon rendering the words "in satisfaction of debt," as applying to each member of the whole preceding phrase, so as to mean every sale in satisfaction, every mortgage in satisfaction, every conveyance in satisfaction, whilst the whole proviso has no reference beyond the sentence which it immediately follows. He therefore regards Clarke as having an absolute power to sell or mortgage, and only limited by requiring the master's assent, to convey in satisfaction of prior debts. I must regard this interpretation as in direct hostility with the spirit and intention of the will, and the acts of the legislature, and equally so to those of the chancellor's order; who would obviously require the same guards against an abuse of trust in a sale for cash, or a mortgage, as in a conveyance in satisfaction of debt. Such an interpretation would, therefore, not be probable, was the language ambiguous or doubtful; but I see no doubt or ambiguity in the order. According to the most clear and obvious use of language, the approval of the master is made a necessary condition to every alienation in any way, or for any purpose. It is a plain question of the meaning of words, in respect to which every man must judge for himself. Differing so widely in my understanding of this meaning from the deliberate judgment of the learned court, I can not speak with the unqualified confidence which I should, had it been presented as a new question; but still, for

myself, I must say, with strong disposition to protect if possible the rights of an innocent *bona fide* purchaser, I have not been able to perceive the slightest color for the meaning given by the supreme court. If this understanding of the order be correct, then the sale by Clarke was a nullity without such an approval by a master. Looking merely to the parties, it is a nullity, because it wants the assent of the chancellor (the virtual trustee), through the officer whom he substitutes to himself. Looking to the conveyance, it is void for want of the performance of that condition precedent which was made essential not merely to the commencement of the estate, but to the very creation of the power of sale.

Nor can an approval by a master with his certificate thereof, given eleven years after the conveyance by Clarke, and five years after his death (when the title had vested in his lawful issue living at his decease), in my opinion aid the legal title under such conveyance. The long interval of time which had elapsed, the death of Clarke, the change in the value of property, would throw doubt upon the transaction, and require explanation and other evidence to support it, were the certificate adduced to enforce an equitable claim for perfecting a title. But we are reviewing the decision of a court of law, and can not look beyond the legal title as it now exists. In order to obtain a legal authority to sell, I think it was absolutely necessary that Clarke should have his contract of sale approved by a master. He neither obtained such approval (as far as appears), at the time when it ought properly to have been obtained, nor subsequently during his life-time. No title, therefore, passed at the time by his conveyance, and on his death the legal title passed to his children, by the operation of the devise and our statute of trusts; nor can that title be divested in a court of law by a subsequent approval of a master; especially after claim of the lands and commencement of a suit for their recovery. It is, indeed, possible that the sale might have been approved at the time, and from some neglect the proper evidence required not duly indorsed on the deed. Of this we have no evidence, nor if we had, could the court below take cognizance of it. But if such were the fact, it would form one of those cases of defective execution which equity could relieve, and equity alone. If the defendant has such a protection to her title, she must go to chancery to give it validity and effect.

As the case now stands, I am of opinion that the judgment of the supreme court should be reversed, on the single ground that

the sale and conveyance by Clarke, not having been approved by a master until years after his death, when the title had passed to the present plaintiffs, were void and inoperative.

On the question being put, Shall this judgment be reversed? seven members of the court voted in the affirmative, and twelve in the negative.

Whereupon the judgment of the supreme court was affirmed.

Cochran v. Van Surlay by no means settled the titles deraigned from Clarke. The decisions, however, all recognize the binding authority of the principal case, if we except *Williamson v. Berry*, 8 How. (U. S.) 495. The questions in that case were identical with those of the principal case. The action was ejectment brought by Mrs. Williamson, one of the daughters of Clarke, against Berry, who deraigned under De Grasse, a grantee of Clarke. The court held in that case that the exposition of a private statute could not be considered as forming part of the local law of real property, and therefore was not binding upon them. Thus left untrameled they proceeded to examine the case. The constitutional power of the legislature to pass acts authorizing the disposition of infants' estates, or, in fact, any of the acts which came under consideration in the principal case, was not impugned. The question was as to the construction of the acts. The court say: "It was said in that case" (*Cochran v. Van Surlay*) "and it was the foundation of the judgment in it that a decree in chancery could not be looked into in a collateral way for the purpose of setting aside rights growing under it. We concur that neither orders nor decrees in chancery can be reviewed as a whole in a collateral way. But it is an equally well-settled rule in jurisprudence that the jurisdiction of any court exercising authority over any subject may be inquired into in every other court, when the proceedings in the former are relied upon and brought before the latter, by a party claiming the benefit of such proceedings. The rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of states. * * * The defendant in this action says he bought from De Grasse. It is proved that De Grasse was a creditor of Clarke, and that the consideration for Clarke's conveyance to him, except the wild lands, was the amount that Clarke owed to him. Then in order to sustain the conveyance of Clarke to De Grasse, he introduces the acts for the relief of Clarke and the orders of the chancellor upon them. This evidence raises the questions whether or not the chancellor had jurisdiction to give an order permitting Clarke to convey any part of the demised premises in satisfaction of his debts, and that neither De Grasse nor his alienee can derive from the order or the conveyance by Clarke to De Grasse any title to the premises in dispute." The plaintiff was held entitled to a recovery.

These titles again came for review before the same court in *Suydam v. Williamson*, 24 How. (U. S.) 427. The court then receded from their former opinion. Their reason was the decision in the case of *Towle v. Forney*, 14 N. Y. 426, in which also titles derived from Clarke were under consideration. There the case of *Williamson v. Berry* was brought to the attention of the court of appeals. But the court refused to be bound by it, holding that in the case of a conflict between the judgments of their own courts and

the judgments of courts of the United States they would be bound by the adjudications of the former, unless the case arose under the constitution and laws of the United States. They declared that the determination in *Cochran v. Van Surlay* was a determination of the court of last resort, not only upon all the questions of law involved in the case then under consideration, but upon the identical title under which the plaintiff in the reported case and the then defendant claimed to own the premises in controversy in the respective suits; and that in such case, there being no pretense of collusion on the part of or imputation of carelessness to the members of the court, the determination should be held conclusive upon all persons in interest, or who might become interested in the question, as well as upon the parties to the particular action. The United States court held themselves bound by the construction thus again given to the state statute by the state courts. Other cases which have upheld the title derived from Clarke, upon the authority of the principal case are: *Toule v. Remsen*, 70 N. Y. 307; *Clarke v. Davenport*, 1 Bosw. 105; *Williamson v. Field*, 2 Sandf. Ch. 547. See also dissenting opinion in *Toule v. Palmer*, 1 Abb. (N. S.) 109.

LEGISLATIVE POWER EXTENDS TO PROVIDING FOR THE SALE of real estate belonging to persons laboring under disabilities of infancy or of other kind, where the sale becomes necessary for their support or for any reasons connected with their interests or welfare: *Matter of Trustees N. Y. P. E. Pub. School*, 31 N. Y. 591; *Anderson v. Mather*, 44 Id. 260; *Breevoort v. Grace*, 53 Id. 251; *Leggett v. Hunter*, 19 Id. 461. But if no such disability exist, the legislature can not provide for the compulsory sale of an estate: *Powers v. Bergen*, 6 Id. 368.

LIMIT TO LEGISLATIVE POWER is that only which is established by the positive provisions of the constitution: *Newell v. People*, 7 N. Y. 109; *People v. New York Gas Light Co.*, 64 Barb. 65; *People v. Quant*, 12 How. 86; S. C., 2 Park. 42; *People v. Toynbee*, 13 N. Y. 412; S. C., 2 Park. 534, all adopting the views of Senator Verplanck on this subject, and rejecting with him the notion of any "higher law" which will authorize the judiciary to declare unconstitutional laws contrary to the first principles of right. To the same effect, see *Hoke v. Henderson*, 25 Am. Dec. 677. Upon the other hand, in *People v. Westchester*, 4 Barb. 73, the court denied that the general powers delegated to the legislature, comprehended such a power as that to transfer the property of one citizen to another, even though no express prohibition on the exercise of the power could be found in the constitution; for such a power was beyond the scope of legislative authority. The act declared unconstitutional in that case seems, however, to have been opposed to the express provision of the constitution, which forbade the taking of private property for public use without just compensation.

LEGISLATURE CAN NOT DEPRIVE AN INDIVIDUAL of his property for the benefit of another: *N. Y. & Oswego R. R. Co. v. Van Horn*, 57 N. Y. 477. But this limitation of power does not prevent the legislature from giving an additional remedy for the enforcement of a right: *Syracuse City Bank v. Davis*, 16 Barb. 192, citing the principal case.

The principal case has also been cited in support of the following propositions: An act will not be declared unconstitutional unless its repugnance to the constitution is so plain as not to admit of a reasonable doubt: *People v. Morgan*, 5 Daly, 184. Expositions of the national constitution by the national courts are of binding authority upon state courts: *Metropolitan Bank v. Van Dyck*, 27 N. Y. 445. The case is also cited in *Wood v. Mather*, 38 Barb. 477, and in the dissenting opinion in *Bowman v. Tallman*, 2 Rob. 399; S. C., 27 How. 278.

THE POWER OF THE LEGISLATURE TO EXERCISE GUARDIANSHIP over minors and their estates was denied in *Jones v. Perry*, 30 Am. Dec. 430, the court holding that the legislature should provide for the protection of infants by the passage of general laws.

WALLER v. HARRIS.

[30 WENDELL, 555.]

REDEMPTION OF LANDS CAN NOT BE ACCOMPLISHED otherwise than by strict compliance with the statute.

SALE UNDER SENIOR JUDGMENT, after the time of redemption expires, cuts off all junior judgments so that no further redemption can be made thereunder or by virtue thereof.

ACCEPTANCE OF REDEMPTION MONEY INDUCED BY FALSE REPRESENTATIONS of the sheriff that the law governing redemptions had been complied with, is not a waiver of the right to object to a non-compliance with the law, and, on refunding or offering to refund the money, to hold the property free from such redemption.

BILL to redeem. Daniel Mason was the owner of the premises in controversy when, in 1824, he mortgaged them to William Stevenson. This mortgage was assigned to the respondent Harris, and being foreclosed by her, she bought in the property January 31, 1833. On the eighth of November, 1833, the appellant tendered respondent the amount of the mortgage on the day of sale, with interest and all costs. The tender was refused, and twelve days later this suit was commenced. The claim of the appellant to redeem was based on the following facts: July 12, 1825, Calvin Barker obtained judgment against Daniel Mason. Execution issued on this judgment, and thereunder the premises were sold to respondent July 25, 1832, for eight hundred and one dollars. On October 25, 1833, the last day for redeeming from that sale, appellant called on the sheriff to redeem from this execution sale, claiming the right to do so as a judgment creditor of Mason and another person, under judgment docketed February 10, 1832. He delivered to the sheriff an execution upon this last judgment, and paid him for respondent eight hundred and seventy-one dollars and nine cents, the amount of her bid at the execution sale with interest. He did not, until October 26, deliver to the sheriff a copy of the docket of the judgment under which he had paid the redemption money. On October 30, the agent of the respondent, under the impression obtained from the sheriff that the copy of the docket had been duly delivered to the sheriff, received from the sheriff the eight hundred and seventy-one dollars and nine cents. The appellant,

on being correctly informed of the facts, offered to refund the money, which was refused. November 5, 1833, appellant obtained a sheriff's deed based upon his redemption, and under this deed sought to redeem from the mortgage. The vice-chancellor decreed that redemption be made. The chancellor on appeal reversed this decision. The complainant then appealed to this court.

A. Taber, for the appellant.

J. Holmes and S. Stevens, for the respondent.

NELSON, C. J. Although this case is quite voluminous, and the points presented somewhat diffuse, it involves but a single question; and that is, whether Waller, the appellant, entitled himself to the benefit of the purchase of the premises under the judgment in favor of Barker, and consequently to the sheriff's deed, by virtue of his attempt to redeem on the twenty-fifth of October, 1833. If he did, he acquired the interest of Mason, the mortgagor, in the premises, and of course the equity of redemption, and is entitled to pay off the mortgage, for the purpose of so far disincumbering his estate. If he did not effectually redeem, and failed to acquire the interest of Mason, then the respondent having by virtue of her purchase become entitled to all the estate that Mason had in the premises, she of course had possessed herself of the equity of redemption, and the appellant had no right to redeem the premises from the effect of the sale under the mortgage.

The idea that Waller may still redeem the mortgage, notwithstanding Mrs. Harris took the interest of Mason under the Barker judgment, is altogether fallacious. After that, he is a stranger, for his judgment, being younger, is no longer a lien on the premises; all the estate of Mason (the defendant in the judgment), on which it could attach, having passed out of him to Mrs. Harris, by title paramount. I am aware it was said that Mrs. Harris lost the benefit of her purchase by subsequently foreclosing the mortgage, and that for that reason Waller's judgment comes in next to it; and as the foreclosure is not conclusive upon judgment creditors, he thus makes out his right. This view is certainly ingenious, and if we are bound to yield to it, will operate successfully, through the forms of law, to cheat (if I may be allowed the term) Mrs. Harris out of the purchase money paid on the sale under the execution, for the benefit of a junior judgment creditor. But the law is subject to no such reproach. After the sale under the execution, Mrs. Harris bought in the

mortgage, and took an assignment; thereby possessing herself of both the interest of the mortgagor and mortgagee; the foreclosure, therefore, was a work of supererogation as regarded junior liens on the equity of redemption. The whole estate had been swept from under them, and vested in her by title paramount. It is true that her title to the equity of redemption under the sale upon the judgment was inchoate, and has been intercepted, if the appellant can maintain his deed from the sheriff, but if not, as she was entitled to it, on the twenty-fifth of October her right became perfect, and related back to the day of the sale; and on that day, in judgment of law, she was the owner of this equity. The question, therefore, in any legal view of the case, is narrowed down to the redemption of the sale under the Barker judgment.

Now it must be borne in mind, that redemption of lands under execution, is a creature of the statute: 2 R. S. 370-374, unknown to the common law, and hence it is obvious we must look to its provisions alone for the steps necessary to acquire a right under it. Before the act of 1820, Sess. Laws, 167, the purchaser was entitled to his deed on payment of the purchase money, by which the title passed absolutely. By that act, a system was devised which in effect extended a credit of fifteen months to the judgment debtor from the sale; and within which time he, or any assignee of his interest, or any junior judgment creditor, at the respective periods designated in the statute, upon complying with certain conditions therein prescribed, might redeem the purchase and take the deed. The act did not prescribe the evidence of the existence, amount, or ownership of the judgment under which the redemption was sought. The right was put upon the facts, *i. e.*: 1. The ownership of a junior judgment, which was a lien; and, 2. The payment of the money within fifteen months. Upon this being shown, the right followed. In 1 Cowen, 443, the court suggest that an exemplification of the judgment would be proper evidence; but in 4 Id. 420, whether such evidence need be produced or not, is made to rest in the discretion of the sheriff. To guard against the abuse that might grow out of the arbitrary exercise of this discretion, and establish a fixed rule by which parties could act understandingly in the steps to be taken, the statute, 2 R. S. 373, sec. 60, provides, that, "to entitle any creditor to acquire the title of the original purchaser, or to become a purchaser from any other creditor, pursuant to the foregoing provisions, he shall present," 1. A copy of the docket of the judgment under which he claims, etc.;

2. A true copy of all assignments, verified by affidavit; and, 3. An affidavit of the true sum due on the judgment, etc. If any meaning or effect is to be given to this section, proof of the ownership of the judgment and payment of the money is not enough; because it declares that to entitle the creditor to acquire the title of the purchaser, pursuant to them, he must, in addition, furnish the aforesaid evidence; this seems to be made in terms as imperative as the existence of the judgment, or payment of the money. This conclusion is also greatly confirmed by recurring to the consideration before stated, *i. e.*, that this proceeding is a creature of the statute; a complete system of itself, and a strict compliance with all the requirements is essential, upon well-settled principles, in order to claim a benefit under it. I know that statutes are sometimes construed to be only directory, and then latitude is allowed; but it is otherwise where the provisions are peremptory. If we also recur to the defect of the law of 1820, and the danger of abuses under it, through the partiality and favoritism of the numerous officers charged with its execution, we are strikingly admonished against frittering away, by doubtful construction, this salutary check. Our bias should incline in favor of regulating discretion, and of adhering strictly to a provision which will enable all parties in interest, and officers, to act understandingly in either claiming or dispensing its benefits.

The reception of the money can not, I think, under the circumstances, prejudice the rights of the respondent. I am, therefore, in favor of affirming the decree.

BRONSON, J. If the appellant failed to effect a valid redemption from the sale under the Barker judgment, there is no ground on which he can maintain a claim to redeem from the mortgage. The sale on execution transferred all such interest as Mason, the debtor, had in the land at the time the judgment was docketed; and when, at the end of fifteen months, the sale ripened into a title, it necessarily destroyed the lien of all junior incumbrances. The lien of the appellant's judgment was at an end, and from that time he was a mere stranger, having neither right nor interest to redeem from the mortgage. The fact that there had been a statute foreclosure of the mortgage, and a purchase under it by the respondent, within the fifteen months, can not alter the case. That proceeding barred the equity of redemption of the mortgagor, and all persons claiming title under him; but those who had obtained judgment liens on the mortgaged premises

were not affected: 2 R. S. 546, sec. 8. The Barker judgment, and the sale under it, were as little prejudiced by the foreclosure of the mortgage as was the judgment of the appellant. Notwithstanding the foreclosure, both judgments continued to be liens on the property until a title was perfected under the first, and then the lien of the junior judgment was extinguished. The appellant must therefore rest his case, as he does in the bill, on the ground—not that he is a judgment creditor merely—but that, being a judgment creditor, he redeemed from the sale under the Barker judgment, and thus acquired the title or equity of redemption of Mason, the mortgagor and judgment debtor.

This brings us to the real question in the cause. Was there a valid redemption from the sale under the Barker judgment? The appellant delivered to the sheriff an execution which had been issued on his judgment, but did not present a copy of the docket. The statute declares, that to entitle a creditor to redeem he shall present to and leave with the officer who made the sale, a copy of the docket of the judgment under which he claims, duly certified, etc.: 2 R. S. 373, sec. 60. The language is too plain and explicit to admit of two interpretations. The provision is, not that the creditor may, but that he shall present a copy of the docket. It is not in the alternative, allowing a copy of the docket, or some other satisfactory evidence. It is not a mere direction to the officer, but a qualification of the right of the creditor. He must not only have a judgment, but to entitle him to redeem, he must present the specified evidence. There is no room for construction; and I do not see how we can hold this a valid redemption without repealing the statute.

The act of 1820 did not prescribe the evidence to be produced by a creditor claiming the right to redeem. The consequence was that this matter was left, in a great degree, to the discretion of the sheriff and his deputies. Different officers were at liberty to adopt different rules of proceeding; and the same officer might sometimes receive, and at other times reject the same kind of evidence. Besides leaving the parties in doubt and uncertainty about their legal rights, a wide door was left open for favoritism and injustice. To remedy these evils, the legislature, in 1830, specially prescribed the evidence which should be presented by the creditor; and thus made the rights of the parties depend, not on the discretion of the officer, but on the law of the land. That this was a salutary provision can hardly be doubted; but if it were otherwise, the remedy belongs to another branch of the government.

In referring to precedents to show how large a license had sometimes been taken in the construction of statutes, the appellant's counsel remarked, that there were subjects of legislative regulation where no one, from reading the statutes, could even guess what was the actual state of the law on those subjects. There is too much truth in this remark. But if the courts have sometimes gone very far towards taking the place of lawmakers, it is but justice to say, that of late years they have been striving, both here and in England, to get back again into their appropriate sphere of action. Except in relation to a few old statutes which were long since overwhelmed by commentaries and decisions, the current of authority at the present day is in favor of reading statutes according to the natural and most obvious import of the language without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation. Courts can not correct what they may deem either excesses or omissions in legislation, nor relieve against the occasionally harsh operation of statutory provisions, without the danger of doing vastly more mischief than good. Let us take, for example, the statutes of frauds and of limitations, which have filled our books with legal adjudication. Had the plain and unequivocal language of those laws been rigidly followed, there would undoubtedly have been a few cases of great hardship; but when it had once been settled that the statutes were not to be limited in their operation by over-refined and artificial interpretations, men would have been able to understand and govern themselves by the law of the land, and an incalculable amount of legal controversy would have been avoided.

In the case at bar we are asked to go much further than the current of authority, either ancient or modern, will warrant. We are asked to overlook and disregard a new provision introduced into the law of redemptions in 1830, and to construe the statute just as though the amendment had never been made. There is, I think, no principle upon which we can hold this a valid redemption. The respondent, by receiving the money which had been paid to the sheriff, did not waive the objection to the sufficiency of the redemption. Her agent acted under the false representation that a copy of the docket had been presented to the sheriff; and when the truth was discovered she offered to refund the money. It is not material that it was the sheriff, and not the appellant, who misled the respondent; nor is it important to inquire whether the sheriff was governed by a bad motive. It is enough that the respondent acted upon information on which she had a right to

rely, and which proved to be false. Indeed, if nothing whatever had been said, it is difficult to perceive how she could waive or consent to forego an objection without knowing that any ground for making it existed.

The regular mode of testing the validity of the redemption was a direct proceeding to set aside the sheriff's deed; and in this action, where the question arises collaterally, I should have held the deed conclusive of the rights of the parties, if that ground had been taken at the proper time. But the parties have, I think, consented to litigate that question in this action. The invalidity of the redemption was set up in the answer; both parties have taken proofs on the question, and it has been the principal point of controversy in the cause. Had the appellant excepted to the answer for impertinence on the ground that the validity of the deed could not be questioned in this proceeding, the respondent would then have moved the supreme court, or filed her cross bill in the court of chancery, for the purpose of avoiding the deed. But no exception to the answer was taken. So far as appears, the appellant suffered the cause to proceed to a hearing and a decree in the court below, without any question as to this mode of trying the right; and now, after a decision against him on the merits, he objects for the first time, and in a court of review, to the form of the remedy. The objection comes too late. We can not yield to it without working great injustice. It was said by the appellant's counsel that the sheriff, under the Barker judgment, sold in one lot several parcels of land, which should have been put up separately, and that the sale was consequently void. If the objection were well founded in point of fact, and if it could be raised in this collateral proceeding, it is a sufficient answer to it that the question is not made by the pleadings. The appellant in his bill does not attempt any impeachment of the sheriff's sale. On the contrary, he expressly affirms the sale, and claims a title under it.

There is another ground on which the cause might, perhaps, be safely placed. If the sheriff in his discretion might dispense with the proof required by the statute when the appellant came to redeem, equity requires that he should have been equally indulgent to the respondent. But I forbear to examine that question, preferring to rest my opinion on the broad ground that there was no redemption, and that the respondent has done nothing to preclude herself from making the objection.

I think the decree of the chancellor is right, and that it should be affirmed.

On the question being put, Shall this decree be reversed? all the members of the court, twenty-three being present, voted in the negative.

Whereupon the decree of the chancellor was unanimously affirmed.

STATUTES SHOULD BE CONSTRUED according to the natural and obvious meaning and import of the terms, without resorting to any forced construction for the purpose of limiting or extending their operation: *McCluskey v. Cromwell*, 19 N. Y. 601; *Chamberlain v. Western Trans. Co.*, 44 Id. 309; *Matter of New York and B. Bridge*, 72 Id. 530; *Gillespie v. Broas*, 23 Barb. 381; *Post v. Bank of Utica*, 7 Hill, 408; *Henry v. Bank of Salina*, 5 Id. 538; *People v. Cowles*, 13 N. Y. 360; *Parsons v. Pierce*, 8 Barb. 663; *Forrest v. Forrest*, 10 Id. 49; *Bell v. Yates*, 33 Id. 638; *Chamberlain v. Western Transportation Co.*, 45 Id. 220; *Hyatt v. Taylor*, 51 Id. 634; *Smith v. Ferris*, 6 Hun, 554; *Burkitt v. Harper*, 14 Id. 583; *Vilas v. Jones*, 1 N. Y. 280. To the same effect see the dissenting opinion in *Rumsey v. People*, 19 Id. 67.

RIGHT OF REDEMPTION.—Whether the prerequisites established by the statute must have been strictly complied with to justify the exercise of this right, or whether certain departures from the letter of the statute should not be tolerated, have been questions which have not apparently received always the same answers in the New York courts. In *People v. Ransom*, 2 Hill, 58, the question was whether or not a creditor might give documentary evidence of his right to redeem within the year from a sale, or whether he should be required to await the termination of the year. The statute, amongst other things, provided that a person coming to redeem must present an affidavit of the true sum due on the judgment, decree, or mortgage, at the time of claiming the right to purchase. The affidavit furnished within the year, when the right to redeem did not yet exist, was held a sufficient compliance with the statute. Bronson, J., dissenting. The court seemed to disapprove of the narrow construction placed upon the statute by *Waller v. Harris*. In *Aylesworth v. Brown*, 10 Barb. 167, an affidavit by a redeeming creditor, setting forth at length the assignments of the judgment to him, and alleging that "the foregoing assignments are true and correct copies of the original assignments of A. and of B.," is a sufficient compliance with the requisition of the statute that the redeeming creditor shall leave with the sheriff a copy of all assignments, upon which his claim depends, verified by his affidavit. And so, though the statute requires a copy of the assignments to be left, leaving the original itself will equally well answer the purpose: *Hall v. Thomas*, 27 Barb. 58; *Ex parte Newell*, 4 Hill, 611; where Judge Bronson thinks that the question would have been one of uncertainty had it not been for the case of *People v. Ransom*, *supra*, which had shaken the authority of *Waller v. Harris*.

In *Miller v. Lewis*, 4 N. Y. 560, on the other hand, the right of redemption was treated as one *stricti juris*, and the law allowing a redemption of "the interest vested in the purchaser by the sale," was so construed, that a redemption was not allowed where a private arrangement between the purchaser and the judgment debtor extended the period in which such interest should vest, beyond the statutory period of one year. The arrangement in that case being that the period for redemption by the judgment debtor should be extended to fifteen months, other creditors were not allowed to redeem from the judgment creditor within that period. In *Silliman v. Wing*,

7 HILL, 161, land was sold under several judgments, and was bid in for an amount sufficient to satisfy them all. The statute required that to effect a redemption, "the sum of money which was paid on the sale" should be paid by the redeeming creditor. The construction given to the clause was such that a lien-holder who desired to redeem was required to pay the entire sum bid at the sale, though some of the judgments, in satisfaction of which the sale was effected, were junior to his lien. See, also, *Bank of Vergennes v. Warren*, 7 Hill, 93, and *Wood v. Moorhouse*, 1 Lans. 416.

DYETT ET UX v. THE NORTH AMERICAN COAL COMPANY.

[20 WENDELL, 570.]

SEPARATE ESTATE OF MARRIED WOMAN, in the hands of her trustees, is, in equity answerable for debts contracted for its benefit. If property be purchased with the proceeds of wife's separate estate and thereby becomes her separate property, a debt contracted with respect thereto is chargeable on her separate estate.

ANSWER OF MARRIED WOMAN IN A SUIT RESPECTING HER SEPARATE ESTATE, in which she is joined with her husband and to which he alone swears, is binding upon her with respect to the admissions therein made.

BILL to subject the income of trust property to the payment of a debt for coal, furnished on order of Joshua Dyett, and used in carrying on a cotton factory, into which part of the trust property had been converted. The house and lot sought to be charged belonged to Mrs. Dyett prior to her marriage. The trust deed was executed in pursuance of an antenuptial contract, and by it the trustees were empowered, with consent of Dyett and wife, to sell the premises and invest the proceeds in other real estate, or in public stocks. The trustees, with the consent of Dyett and wife, raised money on the house and lot and purchased the cotton factory. The other facts appear in the opinion. The bill was dismissed by the vice-chancellor, whose decree was reversed, on appeal, by the chancellor. From this last decree Dyett and wife appealed.

M. Hoffman and B. F. Butler, for the appellants.

J. Blunt and S. Stevens, for the respondents.

COWEN, J. I concur with the chancellor, that the debt in question was chargeable upon the wife's interest in the Broadway house and lot. It is plain that the opinion of the vice-chancellor would have been the same, had he not felt a difficulty in seeing that the Broadway property and factory made parts of one and the same trust estate. It appears to me that it is impos-

sible to separate them. Originally, to be sure, the marriage settlement was confined to the Broadway property; but it is not denied that in pursuance of the very deed of settlement, that identical property was made instrumental in the purchase of the factory. A part was taken from the Broadway property and invested in the factory, by the trustees, with the consent of Dyett and his wife, the *cestuis que trust*. The factory, therefore, in the eye both of law and equity, became substituted for that portion of the Broadway property which was deducted in order to the purchase. In legal effect, it became a part of the Broadway property, subject to the same trusts, and to be read as a part of the original deed: *Taylor v. Plumer*, 3 Mau. & Sel. 562, 575. In this sense the coal, being purchased by Mrs. Dyett for the benefit of the factory, is but another mode of saying that it was for the use of the original trust property, the house and lot itself.

I have supposed that Mrs. Dyett made the contract for the coal. I am aware that this is denied, and correctly, so far as her personal contract is in question. But the denial is carried farther, by saying that she never assented to the appointment of Livingston as agent of the factory, who it is agreed did assume to be agent, and as such to make the contract. It is sufficient, however, that the fact of her assent is not denied, but expressly admitted by the joint answer of Joshua Dyett and herself. It is said that such an answer is not to affect her interests, although she joined in it; that still it is but the answer of the husband; and this I agree is, in general, so. I am not aware, however, that the rule has ever been applied to a wife who is sued in respect to her separate estate. The bill is in the nature of an action at law against her for the recovery of a debt; and although her person is not liable, she is proceeded against, in respect to her estate, as a *feme-sole*. Having an estate, which she is capable of charging by her contract in the first instance as a *feme-sole*, it seems to follow that her admissions, by way of answer or otherwise, are to be received in evidence against her. A single woman sued at law may confess the action. Being liable as such in chancery, she may do the same thing as to the bill, and of course may admit any single fact tending to that consequence. Where her separate estate is completely distinct, and, as here, independent of her husband, she seems to be regarded in equity, as respects her power to dispose of or charge it with debts, to all intents and purposes as a *feme-sole*, except in so far as she may be expressly limited in her powers by the instrument under which she takes her interest: *Jaques v. The Methodist Episcopal*

Church, 17 Johns. 548, 585 [8 Am. Dec. 447], and the cases there cited by Mr. Justice Platt. It follows, according to the same case, that she may deal with her husband by granting the estate to him, or appropriating the estate or its income to his benefit. She may, therefore, sue or be sued by her husband, or become a substantial party against or at the suit of others.

With regard to the form of proceeding, it is true that she must sue by her *prochein ami*, or her husband may, by her consent, be joined with her against a third person. So he must be made a party defendant with her when she is sued, but he is then merely a formal party; the subpoena must be served, not as in ordinary cases, on the husband alone, but on the wife, and if he be absent beyond the jurisdiction of the court, the formality may be dispensed with and the wife compelled to answer alone: *Clancy's Husband and Wife*, c. 11, p. 358-365, of Am. ed. of 1828, and the cases there cited: 2 Johns. Ch. 139. In common cases the subpoena is served on the husband alone, though the suit be against him and his wife; and he then answers for both: *Ferguson v. Smith*, Id.; and according to the late cases of *Hodgson v. Merest*, 9 Price, 556, 563, and *Elston v. Wood*, 2 My. & K. 678, the answer amounts to no more, although the wife join in it. In that case an order may be obtained, for good cause, that she answer separately, and she becomes a substantial party to the suit "only from the time of the order:" *Jackson v. Haworth*, 1 Sim. & Stu. 161, 162; *Carleton v. McEnzie*, 10 Ves. 442.¹ Then, and then only, can the answer be read against her as evidence; and although a joint answer put in by the husband admits the allegations in the bill, they must, according to *Hodgson v. Merest* and *Elston v. Wood*, be proved. In both these cases the admissions in the joint answer were rejected as incompetent, and the decree against the wife proceeded on independent proof. For all this, I can see no reason except that she is but a formal party, a mere cipher, neither served with process, nor appearing, having no copies, notice, solicitor or counsel independent of her husband; everything passing under his exclusive control. But the practice in such case, says Mr. Hoffman, is "inapplicable where the wife's separate estate is proceeded against. There she must be served with a subpoena personally, and if absent, an advertisement under the statute must be resorted to:" 1 Hoff. Ch. Pr. 232. In *Jones v. Harris*, 9 Ves. 486, where the wife had not been served, Lord Eldon said, "that where the service is upon the husband, not merely seised or entitled in right of his wife, and the plaintiff seeks satis-

1. *Carleton v. Dyer*.

faction out of the separate estate of the wife, if she is considered a *feme-sole* for other purposes, she must be so for that purpose also." In *Lillia v. Airey*, 1 Ves. jun. 277, Lord Thurlow said: "The husband is more a formal party than any thing else; for the plaintiff really goes against the wife in respect to her separate maintenance." Thus her case is entirely reversed. She is primarily, if not solely liable; and like every other step in the defense, the answer is her independent act as a *feme-sole*. It would not be denied that the joint answer of a partner would bind him, and she is more than a partner. We are to intend that she had full notice from the beginning, and that her solicitor and counsel have conducted the suit as one really against her. The answer is signed by Jesse Ann Dyett, though sworn to by J. Dyett, her husband, only. It purports throughout to be their joint and several answer, and fully admits the agency of Livingston. By signing the answer Mrs. Dyett has adopted that admission. It was therefore evidence against her in the particular cause as it would be in any other, and that, together with the other proofs, clearly fastens the debt upon her separate estate, to the extent decreed by the chancellor. The solicitor for the complainants had a right, as in other cases, to waive her oath to the answer; and it is not to be tolerated that she should, after having led the complainants to act upon her answer at the hearing, without objection, for the first time in this court, as far as we can see, deny its legal force upon a defect of form which it was her business to avoid. Even if the objection be well founded, it should have been made below, where alone it could have been properly obviated. In *Hodgson v. Merest*, the answer being rejected, the cause stood over for proof upon terms, and the proof was finally obtained.

Livingston being the agent of Mrs. Dyett in respect to the factory, it follows, as we have seen, that a debt contracted by her is chargeable upon the whole of the trust estate, in which this is involved as a part. It is obvious that the credit was not given for the coal to Joshua Dyett individually. There is full evidence not only that it was in fact furnished for the use of the factory, but the agent of the respondents might and probably did collect, from the face of the bill, that the whole was a factory transaction. I am not aware, however, that such knowledge was necessary. I take it to be sufficient that the debt was, in truth, contracted for the benefit of the trust estate: *Upton v. Gray*, 2 Greenl. 373.

The decree of the court of chancery should therefore be affirmed.

All the members of the court, with but one exception, concurring in this opinion, the decree of the chancellor was accordingly affirmed.

WIFE'S SEPARATE PROPERTY is chargeable in equity with her debts contracted on the credit of it, as if she were a *feme-sole*: *North American Coal Co. v. Dyett*, 1 Sandf. Ch. 570; *Noyes v. Blakeman*, 3 Sandf. 540; *Curtis v. Engel*, 2 Sandf. Ch. 288; *Hoard v. Gardner*, 3 Sandf. 191; *Talman v. Hawzhurst*, 4 Duer, 227; *Colime v. St. John*, 12 How. 335; *Coon v. Brook*, 21 Barb. 549; *Todd v. Ames*, 60 Id. 463; *Strong v. Skinner*, 4 Id. 555; *Quassaic Nat. Bank v. Waddell*, 3 N. Y. S. C., 683; *Howland v. Fort Edward Paper Mill Co.*, 8 How. 509; *Com. Exchange Ins. Co. v. Babcock*, 9 Abb. (N. S.) 173; *Vandervoort v. Gould*, 3 Trans. App. 60. The wife's power to bind the estate in this manner seems to depend upon her power to alienate the estate, and therefore, if she have not this power neither can she charge it: *Noyes v. Blakeman*, 6 N. Y. 582. However, this power of disposition will be accorded her, and she may exercise it even without the consent of the trustee in whose hands the separate property is, unless the deed of settlement contain express restrictions upon its exercise by her: *Firemen's Ins. Co. v. Bay*, 4 Barb. 414; *Noyes v. Blakeman*, 3 Sandf. 540; *Vandervoort v. Gould*, 36 N. Y. 642; *American Home Miss. Soc. v. Wadhams*, 10 Barb. 604. The separate estate of the wife is also liable for debts contracted for its benefit, either by herself or by her agent; *Ballin v. Dellaye*, 35 How. 221; *Hauptman v. Catlin*, 4 Abb. 475; *Coon v. Brook*, 21 Barb. 549; *Curtis v. Engel*, 2 Sandf. Ch. 288; *Sinclair v. Fitch*, 3 E. D. Sm. 677.

The remedy that is thus given is entirely one against the property, the debts create no personal obligation; it is therefore necessary that the bill which seeks the enforcement thereof designate particular property which it desires to charge; if it but contain a general allegation that the wife is possessed of separate property, it will be dismissed: *Sexton v. Fleet*, 6 Abb. 11; 2 Hilt. 479; 15 How. 109.

The character of *feme-sole* which is attached to a wife with respect to her separate property will enable her to sue her husband in equity to recover it from him: *Minier v. Minier*, 4 Lans. 622. All relying upon the principal case. The case is also cited in *Adams v. Curtis*, Id. 167.

The doctrine that a *feme-covert* will be treated as a *feme-sole* with respect to her separate property, is also laid down in *Martin v. Dwelly*, 21 Am. Dec. 245. See also the note to *Thomas v. Folwell*, 30 Id. 233, for an extended discussion of this subject.

CASES
IN THE
SUPREME COURT
OF
NEW YORK.

ST. JOHN AND WITHERELL v. S. AND L. W. HOLMES.

[20 WENDELL, 609.]

JUDGMENT AGAINST A FIRM WILL NOT BE VACATED because it was unauthorized by one of the firm, unless the motion to vacate was made by the member against whom the judgment was entered without his authority.

- The judgment is good against the partner who assented to it, though it may be inoperative against his copartner.

MOTION to vacate a judgment. S. Holmes executed a warrant of attorney under seal for himself and as attorney of his copartner, authorizing judgment to be confessed in favor of plaintiffs. On this warrant judgment by confession was taken against both defendants. This motion was made in the name of both defendants, to set aside the judgment, because S. Holmes had no authority to execute the warrant for L. W. Holmes. The affidavit was made by S. Holmes only.

By Court, NELSON, C. J. In *Green and Mosher v. W. and T. Beals*, 2 Cai. 254, the judgment was entered upon a bond and warrant of attorney, signed, as in this case, by only one of the partners, without authority from the other. It was held good against the partner giving the warrant, but inoperative as to the other if he chose to avail himself of the defect; that the court would not interfere except on his application, as he might acquiesce in what his partner had done; and that even if he did apply, the court would not set aside the judgment, but simply direct the execution not to be served on his person or property. See also 1 Wend. 336.¹ The case of *Crane v. French*, Id. 311, in connection with the third section of the act of 1833, Statutes,

1. *McBride v. Hagan*.

sess. of 1833, 395, shows that the judgment in this case is irregular, for the reason that the partner was not in court when the confession was given. This seems to be essential, whether the suit be commenced by writ or declaration, in order to have it operate under the joint debtor act. See also 10 Id. 630.¹ But still, under the practice before alluded to, the partner aggrieved must move. Has he done so in this case? The attorneys appear for both defendants in the motion, but it is founded upon the affidavit of the one who gave the warrant; he is setting up his own fraud by way of defeating the judgment. Should not the copartner deny the authority and show his dissent? His silence in *Green and Mosher v. W. and T. Beals* was deemed an acquiescence in the use of his name: 1 Wend. 336. In the absence of any proof of his dissent of the use of his name, it seems to me, according to the practice as settled, we are bound to hold the proceedings regular.

The distinction between this application to the equitable interference of the court, and the case of an action upon the instrument on plea of *non est factum*, where the issue would stand upon strict principles and the verdict must be for the defendants, is noticed in the cases above referred to.

Motion denied with costs.

The principal case is necessarily in conflict with that line of authorities which assert and enforce the proposition that a judgment is an entirety, and if void as against one defendant is void as against all. This proposition has certainly been accepted and applied by very eminent judges. We purpose to examine the cases in which it has been distinctly announced, and examine its foundations for the purpose of ascertaining whether they are sound either in precedent or in principle. We believe the first case upon this subject is that of *Hall v. Williams*, 6 Pick. 232; 17 Am. Dec. 356, decided by Chief Justice Parker in 1828. This was an action of debt on a judgment against Williams and Fiske, entered in the superior court in Georgia. Fiske had never been summoned and was not a resident of Georgia. The judgment was therefore of no validity against him, and the only question was with respect to its validity against Williams. This question was very summarily dealt with. "The judgment being entire, if it is a nullity with respect to one, it is also in the whole." This is all the court thought proper to say upon the subject; and is the substance of everything which has been said from that time down to the present. For authority the court relied upon *Richards v. Walton*, 12 Johns. 434. Now this case of *Richards v. Walton* did not involve any similar question, nor did the court volunteer any opinion upon the subject of void judgments. The court merely determined that a judgment, when reviewed upon certiorari, must be affirmed or reversed as a whole, and can not be affirmed in part and reversed in part. We know of nothing which has caused so much confusion and misapprehension as the failure to discriminate between voidable and void proceedings—between those proceedings which result from an erroneous exercise of juris

1. *Pardoe v. Haynes*.

diction and those which take place in the absence of any jurisdiction whatever. Every lawyer knows, or at least ought to know, that the existence of errors which demand the reversal of a judgment upon appeal or writ of error, by no means warrants the treatment of such judgment as void. Yet in *Hall v. Williams*, a judgment was deemed void *in toto*, when sued upon as a cause of action, for no other reason than because it would have been reversed *in toto* had any appeal been taken. The next case is that of *Holbrook v. Murray*, 5 Wend. 160, decided in the supreme court of New York, by Marcy, J., in the year 1830. It is founded on the two cases already cited, and upon nothing else. Other cases pursuing the same line of decision, are *Rangely v. Webster*, 11 N. H. 299; *Kapp v. Abell*, 10 Allen, 485; *Buffum v. Ramsdell*, 55 Me. 252.

There are other cases holding that where a judgment is void as to some of the defendants it may be vacated on motion though made by some of the defendants over whom the court had jurisdiction: *Pomeroy v. Bells*, 31 Mo. 419. No doubt, on appeal, if the judgment be shown to be erroneous or void as against any of the defendants, it will be reversed as to all unless some statute has invested the court with power to affirm in part and reverse in part: *Foxcroft v. Tremaine*, Saund. 212; *Coux v. Lowther*, Id. Raym. 600; *Rush v. Rush*, 19 Mo. 441; *Cruikshank v. Gardner*, 2 Hill, 333; *Richards v. Walton*, 12 Johns. 434; *Cov. Mut. L. Ins. Co. v. Clover*, 36 Mo. 302; *Smith's Adm'r v. Rollins*, 25 Id. 408; *Gargan v. School Dist.*, 4 Col. 53; *Streeter v. Marshall S. M. Co.*, Id. 535. Now if, as we think, *Hall v. Williams* and all the subsequent cases in harmony with it upon this subject, rest upon *Richards v. Walton*, and *Richards v. Walton* is no authority either way, then so far as authority is concerned, we think there is substantially none in favor of the position that a judgment void as to one defendant is necessarily void as to all. If the court in Massachusetts really desired to seek advice from those in New York, it might have there found decisions directly in point. Thus *Green v. W. and T. Beals*, 2 Cai. 254, was decided in 1804. This was a motion to set aside a judgment and execution because entered on a warrant of attorney which was void as to W. Beals. The motion was made by T. Beals, and was denied. The court said that if W. Beals was before it, it would simply order the judgment to be executed against T. Beals only. In *Crane v. French*, 1 Wend. 311, a judgment confessed by one partner for the firm, was treated as valid against the partner making the confession, though not against his copartner. In *Brittin v. Wilder*, 6 Hill, 242, it was said, where a judgment had been entered against husband and wife, on a warrant of attorney void as to her, that the plaintiff might amend the judgment record and execution *nunc pro tunc* by striking out the name of the wife, and thus make the proceedings regular against the husband alone.

No doubt seems to have existed at an early day, either in England or in the United States, that judgments entered upon bonds purporting to be the bonds of two or more, but in fact not valid and binding as to some of them, would be vacated as to the party not bound by the bond, and permitted to stand against the other parties: *Motteux v. St. Aubin*, 2 H. Bl. 1133; *Ashlin v. Langton*, 4 Moo. & S. 719; *Gerard v. Basse*, 1 Dall. 119; S. C., 1 Am. Dec. 226. So the judgment may be vacated as against one of the defendants who is shown not to have been indebted to the plaintiff at the time the latter took judgment: *Silvers v. Reynolds*, 2 Harr. (N. J.) 275. In Pennsylvania, a judgment confessed by one partner in the name of the firm "is good as between him and the creditor, though void as to his copartners. Good for what?"

Good not only as evidence of the amount of his indebtedness, but good also as a lien upon his land." *York Bank's appeal*, 36 Pa. St. 460.

The case of *Lessee of Douglass v. Massie*, 16 Ohio, 271, was an action of ejectment. The plaintiff's title was deraigned through a judgment and a sale under execution thereon. It was insisted that this judgment was void, because it was against all the defendants, while the record disclosed that a part only had been served with process. The court held, that the judgment was certainly erroneous; that it would have been reversed upon appeal; but the court further said: "Though this judgment is erroneous upon principle, it can not be collaterally impeached, and until reversed, it is admissible in evidence. But even if the judgment in this case were already reversed, the purchaser's title would, notwithstanding, under our law be secured to him. Considering the judgment erroneous, and therefore voidable, but not void, the court decide that an execution could have been lawfully issued, and lands by virtue of it subjected to sale." This decision is followed and approved in *Ash v. McCabe*, 21 Ohio St. 181; *Newburg v. Munshower*, 29 Id. 619; 23 Am. Rep. 769. In *North v. Mudge & Co.*, 13 Iowa, 498; it was held, that a judgment against a firm, upon the confession of one partner alone, is void against the copartners, but is valid against the partner confessing, and is therefore a merger of the cause of action, so that no further suit can be sustained against the other partners. The earlier cases in Tennessee contain expressions from which it might be inferred that a judgment void as against one of the defendants was void as to all: *Trousdale v. Donnell*, 4 Humph. 272. These cases have been subsequently limited and explained; and the rule of law, in that state, is that such a judgment is erroneous, and therefore subject to reversal, but, while unreversed, is binding upon the defendants over whom the court had jurisdiction: *Winchester v. Beardin*, 10 Id. 246; *Valentine v. Cooley*, Meigs, 618; 33 Am. Dec.; *Collins v. Knight*, 3 Tenn. Ch. 183. In Nebraska, a judgment against a principal and his surety, upon the appearance of the former, though void as against the surety, is valid against the principal, and a sale thereunder of the property of the latter is an effectual transfer of his title: *Mercer v. James*, 6 Neb. 406.

We understand the latest decisions in Missouri to be in harmony with the principal case. Thus, in that state, where judgment was entered against a number of defendants, some of whom were infants and others non-residents, and such infants and non-residents were not properly before the court at the time judgment was given against them, the judgment was treated as valid against the parties in court, and the cases "in regard to the entirety of a judgment" were said not to be applicable: *Bailey v. McGinniss*, 57 Mo. 362.

The authorities heretofore cited show that the courts of the states of Massachusetts, Maine, and New Hampshire are fully and perhaps unalterably committed to the doctrine that a judgment is an entirety, and if void against one of the defendants is void as to all; and that the decisions in New York are varied and irreconcilable, but with the majority in number against this proposition. It also appears that the decisions in support of this proposition rest, either directly or indirectly, upon *Richards v. Walton*, 12 Johns. 434, and that this case can not fairly be relied upon either to support or overthrow the proposition. While some common law decisions are cited to support the proposition, none of them do necessarily support it; and by those which are really in point, the proposition is assailed rather than supported. The states of Iowa, Missouri, Nebraska, Ohio, Pennsylvania, and Tennessee have pronounced against it. It may, therefore, fairly be said to be against the weight of authority, and we believe it to be without any other support than the authority

of those eminent courts which, through what we conceive to be either a misapprehension of a prior decision, or of the real nature of the question in issue, pronounced in its favor. We say misapprehension of the question in issue, because the court seemed to treat it as a mere question of error, and not of power, and to assume that if error was shown the judgment was void. If judgment be entered against several defendants when one of them has not been served with process, it is certainly erroneous; with respect to the one not served it is also unquestionably void. If the irregularity be urged against the judgment by way of appeal, there are many cases in which it ought to be available even in favor of the defendants properly before the court, for if the judgment be permitted to stand, they alone may be subjected to a liability which others ought to share with them. But if the question arises collaterally, no inquiry ought to be permitted which does not involve the power of the court which pronounced the judgment. If any defendant was not by service of process or by voluntary appearance brought within the jurisdiction of the court, it is clear that he may, under proper pleadings, prove this fact, for such proof shows the court had no power to pronounce any sentence against him. But if, on the other hand, it appears that the subject-matter of the action was within the jurisdiction of the court, and that the person against whom the judgment is sought to be or has been enforced, was served with process or appeared voluntarily, then a complete case of jurisdiction over him seems to be established. From the moment that he was personally brought within the jurisdiction of the court, it had power to proceed to judgment against him; and we think that so far as he is concerned, it is not without power to enter judgment nominally against him and his co-defendants, though from some reason it may not be enforceable against those co-defendants. A judgment nominally against him, omitting his co-defendants, while it might be erroneous would not be void. A judgment nominally against all, but in law binding on him alone, is, we think, of precisely the same effect. Both are valid against him because pronounced by a court having jurisdiction over him and the subject-matter; but both are erroneous because the jurisdiction possessed by the court was not correctly exercised; and each may therefore be reversed by appeal or writ of error.

The argument upon one side of this subject is usually expressed substantially as follows: "The judgment is entire, and if void as to one defendant, where there are several, it is void as to all:" *Holbrook v. Murray*, 5 Wend. 163. This sentence is terse, perspicuous, and dogmatic. But is it logical? Is there anything in a judgment which necessarily prevents its being enforced against one defendant without affecting the others? Is there any such personal unity of judgment debtors as pertains to tenants by the entireties, each of whom is incapable of acting without the other? There certainly is not. Each defendant must be served with process or enter his appearance; each may answer for himself and make such defense as to him seems proper; each may be required to satisfy the judgment by a levy on his individual property. And if there is any such personal identity that a judgment void as to one defendant must necessarily be void as to all, this identity is arbitrarily imposed by the decisions of the courts and does not naturally result from either the legal or physical relations of the parties.

CONFESSION OF JUDGMENT BY ONE PARTNER against the express wishes of the other, is inoperative to bind the property of the latter: *Everson v. Gehrman*, 1 Abb. 155; S. C., 10 How. 308, distinguishing the principal case by showing that in it all that was declared was that the judgment so obtained would be binding upon the party by whom it was confessed. The principal case is also cited in *Waring v. Robinson*, Hoff. 527.

IN THE MATTER OF ANTHONY STREET, IN THE CITY OF NEW YORK.

[20 WENDELL, 618.]

PLAINTIFF MAY DISCONTINUE PROCEEDINGS TO ACQUIRE PROPERTY for widening a street, at any time prior to the final confirmation of the commissioner's report.

VESTED RIGHT TO DAMAGES ASSESSED for property sought to be taken in the exercise of the power of eminent domain, does not exist until the final confirmation of the commissioner's report.

NO PART OF THE COMMISSIONER'S REPORT CAN BE REGARDED AS FINALLY CONFIRMED while any part remains under consideration and unapproved.

PETITION by the corporation of New York city for leave to discontinue proceedings for the acquisition of property for the widening of a street. Affidavits were offered to show the injustice of granting the petition.

C. O'Connor and J. McKeon, for the motion.

D. Lord, jun., and S. Stevens, *contra*.

By Court, COWEN, J. The cases heretofore decided by this court and the court of chancery, leave it quite clear that individuals acquire no vested right under these street proceedings, and therefore can not insist that the corporation shall go on, until the final confirmation of the report of the commissioners of estimate and assessment. *Kent, Ch.*, in the *Corporation of N. Y. v. Mapes*, 6 Johns. Ch. 49; *Matter of the application of the Mayor etc. relative to Third Street*, 6 Cow. 571; *Hawkins v. The Trustees of Rochester*, 1 Wend. 53 [19 Am. Dec. 462]; *The People v. Brooklyn*, Id. 318 [19 Am. Dec. 502], *et seq.*, and other cases there cited; *Matter of Canal Street*, 11 Id. 154. This view accords best with the language of the statute under which the proceedings take place: 2 R. L. of 1813, 413, 414. By that act, so often as this court shall be dissatisfied with the report of the commissioners, it is to be referred back for revisal and correction; and on the final confirmation of the report, the corporation becomes seised; and, according to the cases, the corresponding rights of others vest.

In the case at bar, there has been no final confirmation within the meaning of the act. The whole report was referred back as the statute requires it should be until we should be satisfied with it. The only difficulty raised is based on the concluding language of the rule, which declares, that the report is confirmed in all respects, excepting two particulars, wherein the commis-

sioners were directed to make corrections. That, however, was clearly but another mode of expressing the opinion of the court, for the benefit of the commissioners and parties. It could not alter the legal effect of the reference, which was of the whole report; and indeed left the whole open for possible revisal. The confirmatory language in which the rule has been thought convenient, as indicating our approval of a certain portion of the proceedings, and the word approved might have been more apt than confirmed; but the legal result is the same. Unless specific errors are pointed out in some way, the whole ground might be traveled over, and a thousand persons be heard by the commissioners, and again by the court, though, on the first hearing, we were satisfied with all except one or two particulars. Strictly speaking, there is in any one proceeding but a single report; and what are called second or third supplemental reports, are but parts or modifications of a legal whole. As such it passes by reference between the court and the commissioners. It can not be confirmed piecemeal. The whole proceeding is entire, like a suit at law; and, in a legal sense, the whole is confirmed or discontinued at a single blow. This, too, seems to me the only method of considering the matter which is feasible and just to all parties. The report of estimate and assessment alone is what we have power to review. This has reference to and is dependent on a single improvement, which can not be split into fragments, in proportion as we may from time to time allow or disallow parts of the report; relative rights, claims, and liabilities becoming vested and apportioned accordingly.

It is true, that the proceedings on the report being entire and indivisible, a confirmation of part would be a confirmation of the whole, upon the general principle that a plaintiff or prosecutor can not split his claim. If he take judgment for a part, it is a judgment for the whole, and bars all proceeding by another suit or in the same suit for the residue. But the rule means a judgment or confirmation final in its legal character. Accordingly a judgment, which is in form one of nonsuit by a common magistrate, shall be held to be a nonsuit or a judgment final on the merits, and barring a second suit, accordingly as the justice had the legal right to render judgment with the one or the other effect at the time: *Hess v. Beekman*, 11 Johns. 457; *Ellis v. McQueen*, 10 Wend. 519. These cases proceed on the ground that, on given circumstances, the law directs a certain judgment to be rendered; and that it can not be varied by the form of the entry. So in the case at bar, the law directed, on this court being

dissatisfied, that the whole report should be referred back. It was so referred back by the rule, and the subsequent words of confirmation could not change the legal effect. Strictly the whole stood open. See *per* Lord Ellenborough, C. J., in *Strachey v. Turley*, 11 East, 200.

The motion to discontinue is granted.

Confirmation of the report of commissioners can not be so absolute as to give rise to vested rights under the same, before the damages for all lands to be taken for the proposed improvement have been ascertained and settled, and are properly assessed upon the owners of lands which will be benefited by the improvement: *Meserole v. Brooklyn*, 8 Paige, 208; *In the matter of Wall Street*, 17 Barb. 625. Proceedings to acquire property under the exercise of the power of eminent domain may be discontinued at any time prior to the confirmation of the report of the commissioners: *Central Park case*, 12 Abb. 110; *In the matter of the Opening North Thirteenth Street*, 5 Hun, 175; *In the matter of Washington Park*, 56 N. Y. 156; *In the matter of Wall Street*, 17 Barb. 642; *In the matter of Syracuse, B. & N. Y. R. R. Co.*, 4 Hun, 313, where the principle was applied in favor of a railroad company.

The report of commissioners can not be attacked upon the ground of error of judgment of the commissioners in fixing the amount of damages for the lands taken, or the benefit that would be derived to other lands by the improvement: *Wiggins v. New York*, 9 Paige, 20. Nor can the confirmation of the report be attacked upon other grounds than that of fraud: *Matter of Lexington Avenue*, 5 N. Y. S. C. 437, all relying upon the principal case, which is also cited in *Buell v. Lockport*, 11 Barb. 609.

CASES
IN THE
COURT OF CHANCERY
OF
NEW YORK.

HOFMIRE v. HOFMIRE.

[7 PAGES CH. 60.]

DECREE OF DIVORCE OBTAINED BY A WIFE against her husband upon the ground of adultery while he was confined in the state prison upon conviction of a felony, will not be opened for the purpose of enabling the defendant to set up a condonation of the adultery as a defense.

WHETHER THE COHABITATION OF A WIFE WITH HER HUSBAND after his private confession to her of an act of adultery, but which she has no means of proving so as to justify her in leaving his bed and board, and to protect her friends who might receive and harbor her against his will, is such a condonation of the offense as will bar her suit for a divorce, upon a subsequent discovery of the means of establishing his guilt, *quære*.

APPEAL from a decision of the vice-chancellor of the first circuit, refusing to open a decree of divorce and to permit the defendant to put in an answer setting up a condonation of the adultery charged in the bill, in bar of the suit. The defendant's affidavit upon which the motion was founded, admitted that he had been guilty of adultery on one occasion; but alleged that his wife, after being informed thereof, freely forgave him and continued to cohabit with him until he was sent to the state prison.

I. W. Bishop, for the appellant.

C. Edwards, for the respondent.

WALWORTH, Chancellor. There was no irregularity in this case, which could authorize the appellant to apply to open the proceedings on that account. Although the solicitor who appeared for him in the suit was employed by the mother of the

defendant, and without authority from him, it did not in any way prejudice his rights. He employed no solicitor, and the bill would have been taken as confessed against him, for want of an appearance, if Mr. Crafts had not appeared at the request of the mother; in which case no order to answer would have been necessary. The solicitor who had appeared without authority, had therefore a perfect right to waive a mere formal proceeding which such unauthorized appearance only had made necessary. He did not and could not consent to the divorce itself, which was obtained on the usual order of reference, and upon full proof of the adultery charged. The only question, therefore, is whether the defendant ought to have been permitted, as a matter of favor, to come in and set up the alleged condonation, after a regular decree, under the circumstances of this case.

It appears by the defendant's admission, that he had left the bed of his young and virtuous wife, who by his own showing was devotedly attached to him, to enjoy the embraces of a worthless, common prostitute. And from the complainant's affidavits it is doubtful whether she cohabited with him after she had such a knowledge of his guilt in this respect as to justify her in leaving him and seeking legal redress. His private admission of the fact to her, was not sufficient to authorize her to take any proceedings against him; or even to protect her friends for harboring her against his will, if she had then abandoned his bed and board. I am not therefore prepared to say that this defense would have been available, if it had been set up before he had been guilty of a second offense, not merely against the domestic happiness of his wife, but also against the general welfare of the community. After he had been guilty of this felony, for which he had been convicted and sent to the state prison, both she and her friends were perfectly right in attempting to dissolve a connection which could no longer be continued consistently with her happiness; provided such connection could be dissolved in accordance with the principles of the gospel, and the laws of the state. The final decree for such a dissolution of the marriage contract, she had regularly obtained at the time this application was made. And under the circumstances of the case, I think the vice-chancellor would not have exercised the powers of this court discreetly if he had opened that decree, for the purpose of sending back this much injured woman to the now loathed embraces of an adulterer and a felon.

The order appealed from must therefore be affirmed with costs.

The decision in the principal case before McCoun, vice-chancellor, is reported in 3 Edw. Ch. 173, under the name of *Hoffmire v. Hoffmire*.

ADULTERY, PROOF OF.—It is not necessary to prove adultery by direct testimony, but it may be inferred from circumstances that lead to it by fair inferences as a necessary conclusion: *Richardson v. Richardson*, 30 Am. Dec. 538.

ADMISSIONS OF PARTIES TO DIVORCE SUIT.—This subject is discussed at length in the note to *Richardson v. Richardson*, 30 Am. Dec. 544.

REFORMED PROTESTANT DUTCH CHURCH IN GARDEN STREET v. MOTT ET AL.

[7 PAIGE CH. 77.]

STATUTE OF ELIZABETH RELATIVE TO CHARITABLE USES was never acted upon in New York; but courts of chancery independent of such statute had an original jurisdiction to enforce and compel the execution of such trusts.

CONVEYANCE TO CERTAIN INDIVIDUALS, of the site of the Dutch church in Garden street, in the city of New York, in 1691, in trust for the use of the ministers, elders, and deacons of such church, and their successors, and for no other purpose, was a valid conveyance to a charitable or pious use at the common law, and vested the legal title to the premises in the trustees absolutely and irrevocably, for the uses therein declared.

WHERE REAL ESTATE IS CONVEYED to trustees for the use of a church or congregation, as a place of worship, and such church or congregation is afterwards incorporated, to enable the corporation to take and hold the legal title, it will be presumed, after a great lapse of time, that there was a conveyance of the legal title from the trustees to the corporation.

LEGISLATIVE ACT TRANSFERRING THE LEGAL TITLE OF A MERE NAKED TRUSTEE and vesting it in the *cestui que trust*, in a case where the latter, by a resort to the proper tribunal, might have compelled such transfer, is constitutional and valid.

EFFECT OF THE ACT OF MARCH, 1801 (1 R. L. of 1801, 339), upon real estate held by individuals in trust for a Dutch church, incorporated prior to the passage of that act, was to transfer the legal title to such estate from the trustees directly to the corporation for the use of the corporators.

NO SUBSEQUENT VIOLATION OF SUCH TRUST would ever reveest either the legal or equitable title to the property conveyed in the original grantor, although a palpable breach thereof might form a proper ground for an application to the court of chancery on the part of the corporators, or by the attorney-general, to compel the due execution of the trust.

CORPORATIONS AGGREGATE, at the common law, had an unlimited power over their property, and they could alienate or grant any lesser estate therein without limitation or restriction.

ACT OF 1806 (Laws of 1806, c. 43, sec. 4) gives to religious corporations the power to convey real estate which is held in trust for the corporators; provided, the previous consent of the court of chancery to the alienation is given, as authorized by that act.

WHETHER THE SUBSEQUENT RATIFICATION of a sale made by such corporation, without having previously obtained the consent of the court of

chancery, would have the effect of vesting the title in the grantees discharged in equity of the charitable trust or use, *quære*.

BILL FOR A SPECIFIC PERFORMANCE will not be dismissed, as of course, because the title was not perfect at the commencement of the suit, although that may be a sufficient reason for giving costs to the defendant, if he has not made any unreasonable objection to the title.

SPECIFIC PERFORMANCE MAY BE DECREED, if it appears by the report of a master that a perfect title can be made to the purchaser at the time of making such report, unless the purchaser has been materially injured by the delay.

BILL for the specific performance of a contract of sale to the defendants of a lot in the city of New York, a part of the site of the Low Dutch church in Garden street. The only question between the parties was as to whether the complainants could give the defendants a perfect and unincumbered title to the premises.

George Wood, for the complainants.

Henry R. Storrs, for the defendants.

WALWORTH, Chancellor. To understand the various questions raised on the hearing, and which were so fully and ably discussed in this case, it is necessary to advert to the early history of the title under which the complainants claim the right to sell and convey the premises in question, for the benefit of their church and congregation, under the order of this court authorizing a sale. It appears that on the eighteenth of February, 1691, the corporation of New York conveyed to Samuel Bayard a lot on the north side of Garden street, now Exchange place, being one hundred and eighty feet in front on the street, and including the premises in question in this cause. And that a few days thereafter, S. Bayard conveyed the same premises to S. Van Cortlandt, N. Bayard, and J. Kipp, in fee, for the purpose of having a church or suitable building erected thereon, for the common use of the ministers, elders, and deacons of the Low Dutch church, which then were or at any time thereafter should be within the city of New York, professing the canons of the national synod of Dort; as well for the public and solemn worship of God, as the exhortation and instruction of the people of that church in and to true religion and virtue. The conveyance was declared to be in trust, that the grantees and their heirs and assigns should keep, enjoy, possess, and hold the lot and premises thereby conveyed, to and for the general use of the ministers, elders, and deacons of such Low Dutch church and their successors, and to no other use or uses whatever. This was un-

questionably a valid conveyance to a charitable or pious use, at the common law; and vested the legal title to the premises in the trustees, absolutely and irrevocably, to and for the secondary uses therein declared. And this court, independent of the statute of Elizabeth, relative to charitable uses, which was never acted upon in this state, had an original jurisdiction to enforce and compel the performance of the trust. As the statute of Elizabeth had a retroactive effect, and as we have very few reports in chancery previous to that time, it is difficult to find adjudged cases on this subject which are not in some way dependent upon the provisions of that statute.

This fact had led some judges to suppose the court of chancery had no jurisdiction on the subject previous to that time. The general jurisdiction of this court, however, to compel the grantee of the legal estate to apply it to the use of the individuals for whom it was intended by the grantor, was well established long before that time. It is also a matter of history, that during the protracted struggle between the different princes of the red and of the white rose for the national sovereignty, much of the landed property in England was held under conveyances which could only be made available to its real owners by the exercise of such a jurisdiction. And as devises, donations, and bequests to pious and charitable uses, which were well known to the civil law, were common in England, long before the statute of Henry the Eighth had turned ordinary uses into legal estates, it would indeed be strange if the court of chancery had not at that time assumed the same jurisdiction over conveyances and bequests to charitable and pious uses, as it had over conveyances to the use of particular individuals. There is one case that I have been able to find, decided in 1581, nearly twenty years before the passing of the statute of charitable uses, which shows clearly that the court of chancery was in the habit of sustaining defective conveyances to charitable uses, as a part of its ordinary jurisdiction, previous to the statute 43 Elizabeth. I refer to the case of the charitable use under the will of Symons, the Winchester alderman; where Lord Chancellor Bromley compelled the heir to execute a conveyance of real estate devised to a charitable use, in conformity to the intention of the testator; the deed of bargain and sale which the testator himself had executed to the trustee, being void for want of enrollment: *Duke on Char. Uses*, 163. The case of *The Mayor and Burgesses of Reading v. Lane*, Toth. 32, decided the same year the statute was passed, was also most probably a case depending upon the

general jurisdiction of the court as it existed before the statute; as it is hardly possible that a case could have gotten before the court upon an appeal from a decision of commissioners appointed under the statute, at so early a day.

In 1696, the persons for whose use this conveyance in trust was made, were duly incorporated by a royal charter by the name of The Ministers, Elders, and Deacons of the Reformed Protestant Dutch Church in the city of New York; for the avowed purpose, among other things, of enabling them to hold this property for the uses to which it had been conveyed to the trustees. And this and other property was in and by that charter confirmed to them by the representatives of the crown. Although this confirmation was not necessary to give the church and congregation the use of the property vested in their trustees, it probably was considered necessary to enable the corporation to take and hold the legal title; as the annual value of other property which the corporation might thereafter purchase or acquire was limited by the charter. And such confirmation certainly is evidence from which a presumption may arise, after a lapse of one hundred and forty years, that the trustees actually conveyed the legal title to such corporation. The case of *The Corporation of Reading v. Lane*, above referred to from Tothill, and which is likewise reported by Duke, is also a case in point to show that where there was an appropriate corporation, whose general duty it was to administer the charitable use, and which was legally authorized to hold the legal title and to receive and apply the rents and profits accordingly, this court had the power to compel a conveyance of the trust property to such corporation. Although the defendants, therefore, have no knowledge of the execution of a conveyance by the trustees to the corporation which was subsequently lost, and do not admit the same, yet as the corporation has always possessed and enjoyed the property, and as there was no reason whatever for keeping the legal title in the original trustees, or their heirs, after the confirmation thereof to the *cestuis que trust* as a corporation by the charter of 1696, the legal presumption is that such a conveyance was executed by the trustees as alleged by the complainants.

Independent of such legal presumption, however, the fourth section of the act of March, 1801, to provide for the incorporation of religious societies (1 R. L. of 1801, 339), was sufficiently comprehensive in its terms to transfer the legal title of this property from the heirs of the original trustees to the corporation, if it had not before been conveyed. The second section of

that statute declared that the ministers, elders, and deacons of every Reformed Dutch church or congregation then existing, or thereafter established, should be the trustees thereof; and it authorized such congregations as were not then incorporated, to incorporate themselves in the manner therein prescribed. The fourth section then provided that the trustees of any church, congregation, or society, previously mentioned in the statute, which of course included this church or congregation incorporated in 1696, and recognized in the same section as an existing corporation, might take into their possession and custody all the temporalities, and might recover, hold, and enjoy, all the debts, and real and personal estate belonging to the church, congregation, or society, in whatsoever manner the same might have been acquired, or in whose name soever the same was held, as fully and amply as if the right or title thereto had been originally vested in such trustees. The necessary effect of this statute, therefore, was to transfer to this corporation the legal title to all property which was then held in the name of others upon a mere naked trust for the use of the church or congregation, or of the corporators. That the legislature had the power to transfer the legal title from the mere naked trustees to the *cestuis que trust*, after the latter were incorporated, in a case where the trustees might themselves be compelled to make such a transfer under a decree of this court, there can not be any room for doubt: See 1 R. S. 227, sec. 47; *Morgan et al. v. Leslie*, Wright (Ohio), 144. There is no doubt, therefore, in the present case, that previous to the separation of the complainants from the collegiate churches, in 1812, the legal as well as the equitable title to the premises in Garden street was absolutely vested in the corporation of such collegiate churches for the use of its corporators. And no subsequent violation of the trust upon which the property was held, can ever revert either the legal or equitable title in the heirs of Samuel Bayard, or in the heirs of the original trustees, although a palpable breach of trust might form a proper ground for an application to the court of chancery, on the part of the corporators, or by the attorney-general, to compel the due execution of the trust. This, therefore, disposes of the first objection to the complainants' title.

The complainants having become incorporated as a separate and distinct church and society, in 1812, under an agreement with the remaining branch of the original church or society, the corporation of the collegiate churches, in 1813, gave to them a lease of the church and premises in Garden street for the term

of nine hundred and ninety-nine years, upon a pepper-corn rent, to hold the premises as a site for a church, and as a place of interment; subject to various restrictions and conditions for the purpose of rendering the use of the premises, and the doctrines and discipline of the church which should worship there, conformable, as far as might be, to the original trusts upon which the property was held. But after the destruction of the church by the great fire, the corporation of the collegiate churches conveyed to the complainants the absolute title to the premises, for a full consideration of one hundred thousand dollars. It is not necessary, therefore, to inquire here whether the severance of the church property and the lease of this part of it to the complainants, was such a violation of the trust upon which the property was held as to have authorized any of the corporators of the collegiate churches to interfere. I am inclined to think it was; as no application was made to this court to sanction such a transfer of the property, without consideration, and upon trusts different from those upon which the property was held by the terms of the original charter, and of the act of 1801 before referred to. There is no doubt, however, that the legal title to the premises passed to the new corporation for the nine hundred and ninety-nine years by virtue of that lease. There was no law in force at that time to prevent a corporation, or any other trustee, from conveying the legal title to property held in trust, in such manner as to vest it in the grantee, subject to the equitable right of the *cestui que trust* to reach and control the same at any time afterwards by the power of this court, if the land had not passed into the hands of a *bona fide* purchaser discharged of the trust. The complainant's title to the property does not depend upon the validity of the lease of 1813, but upon the conveyance of 1836. For that reason also it is perfectly immaterial whether the yearly value of the property in 1813, was more or less than the sum of three thousand dollars; that being a much less sum than the amount to which the complainants were restricted when the deed of 1836 was executed.

I apprehend that the complainants' counsel has entirely misunderstood the intent and meaning of the act of March, 1806, authorizing religious corporations to convey their corporate property under the sanction of the chancellor: Laws of 1806, c. 43, sec. 4. At the common law, every corporation aggregate had unlimited power over its property, and might alienate the same in fee, or grant any lesser estates therein, without limitation or restriction: Co. Lit. 44 a, 300 l; *Smith v. Barrett*, 1 Sid.

161, *per* Lord Mansfield, 1 Burr. 221.¹ And the same general power as to corporations, is recognized in the recent revision of the laws of this state: 1 R. S. 599, sec. 1, sub. 4. Certain statutory provisions had, however, been enacted in England, at a very early day, to restrain the alienation of church property, which fact was sufficient to render it doubtful whether they were not applicable to church property here. But the principal difficulty which existed, was the general power which this court had to control the application of property given or devised to corporations and others for charitable uses, so as to render the legal estate in the hands of a purchaser, with notice of the trust, chargeable with the charitable use to which it was originally devoted. And as the law of patronage had never been extended to this state, and was inconsistent with the spirit of our institutions, it became necessary to vest in some tribunal the power of sanctioning alienations of church property for the benefit of those who were real owners of the same, and to direct a new investment of the proceeds, without the expense and delay of an application to the legislature in every particular case. I have no doubt, therefore, that the intention of the act of March, 1806, was to give to every religious corporation an unlimited power to convey any real property held by them in trust for the corporators; provided the previous consent of this court to such alienation of the church property, and a direction for the proper application of the proceeds thereof for the benefit of the corporators was obtained, in the summary mode which is there prescribed.

If such a sanction of the sale of the premises in question to the complainants, and a proper direction for the investment and application of the purchase money had been given in this case, previous to the conveyance of May, 1836, I should have compelled the defendants to take this title notwithstanding the other objections thereto. But as the statute had prescribed the mode in which the sanction of this court to a conveyance of property by a religious corporation should be obtained, I have great doubts whether the subsequent ratification of the sale was sufficient to give a perfect title, discharged in equity of the charitable trust or use. At all events it would be unreasonable to compel a purchaser to take such a title, when there can be but little doubt that the title can be made perfect at a trifling expense in the usual mode. From the statement in the bill, and the admission in the answer, it is evident that the annual

1. *Trelawney v. Winchester.*

value of the Garden street property, in its present state, does not exceed the amount prescribed for the complainant's corporation in the act of 1819.

It is not a matter of course, however, to dismiss a bill for specific performance merely because the title was not perfect at the commencement of the suit; although that may be a sufficient reason for giving costs to the defendant, if he has not made any unreasonable objection to the title. A specific performance may be decreed, if it appears by the report of a master that a perfect title can be made to the purchaser at the time of making such report, unless the purchaser has been materially injured by the delay.

It must therefore be referred to Master Codwise to inquire and report whether the complainants are now able to make a perfect title to the defendants of the lot in controversy. And upon the coming in of the master's report, if it appears that a perfect title can then be made, there must be a decree for a specific performance, upon payment of costs to the defendants. But if such a conveyance of a good and unincumbered title can not be made, the bill must be dismissed with costs.

STATUTE OF 43 ELIZ. IN FORCE IN WHAT STATES: See *Going v. Emery*, 26 Am. Dec. 645 and note thereto; *Methodist Church v. Remington*, Id. 61 and note.

REQUESTS TO CHARITABLE USES, VALIDITY OF.—This subject is discussed in its various phases in the note to *Dashiell v. Attorney-general*, 9 Am. Dec. 577; also in *Methodist Church v. Remington*, 26 Id. 61, 68, note; *Going v. Emery*, Id. 645 and note; *Burr v. Smith*, 29 Id. 154; *Moore's Heirs v. Moore's Devises*, Id. 417; *Sanderson v. White*, Id. 599, note.

JURISDICTION OVER REQUESTS TO CHARITABLE USES resides in courts of chancery independent of the 43 Eliz.: *Burr v. Smith*, 29 Am. Dec. 154; *Moore's Heirs v. Moore's Devises*, Id. 417.

NOYES v. CLARK ET AL.

[7 PAGES OR. 179.]

TENDER, EFFECT OF PREVENTING.—Where a bond and mortgage, which provided for the payment of the principal sum in five years, and the interest annually, and if the interest was not so paid the whole principal should become due, was assigned by the mortgagee, and notice given to the mortgagor of the assignment, but no information given of the assignee's residence, and when the interest became due, the mortgagor being unable to find the assignee, tendered the interest due to the mortgagee, who refused to accept it, and shortly afterwards the assignee filed a bill to foreclose, the tender was held sufficient to save the forfeiture, or at least to authorize the court to stay the proceedings to foreclose upon the payment

of the interest then due, until further default in payment of the principal or interest, it appearing that the assignment was to deprive the mortgagor of the power of paying the interest when it became due.

SUIT COMMENCED by a creditor, who keeps out of the way to prevent a tender of the amount due him, will be stayed upon payment of the amount due, without costs, although a technical right of action existed at the commencement of the suit.

COURT OF EQUITY WILL NOT interfere to relieve a mortgagor, who by his negligence fails to perform his contract, whereby the whole debt becomes due and payable according to the terms of the mortgage, unless he tenders or pays the whole debt.

A MORTGAGEE OR HIS ASSIGNEE will not be permitted to take an unconscionable advantage of the mortgagor, who is willing to pay at the time prescribed, but is prevented from doing so by their acts.

APPLICATION to stay proceedings in a foreclosure suit, upon payment of the interest due on a bond and mortgage, given February 10, 1835, conditioned to pay eight hundred dollars in five years from date with interest payable annually, and if default was made in such payment the whole principal and interest was to become due and payable. The interest was paid for the first two years by Clark, the mortgagor, to one Hall. Shortly before the interest became due in February 1838, Hall assigned the bond and mortgage to T. Roberts and informed Clark that he had so assigned them, but gave him no information of the residence of the assignee. Clark, after many ineffectual attempts to find Roberts or his place of residence, tendered the interest to Hall on the day it became due, who refused to receive it because of the alleged assignment to Roberts. No such assignment appeared of record. Clark, while endeavoring to find Roberts, was served with a subpoena upon a bill by the complainant as assignee of Roberts, to foreclose the mortgage.

M. T. Reynolds, for the complainant.

J. Edwards, for the defendant Clark.

WALWORTH, Chancellor. I think from the petition of the defendant Clark, when taken in connection with the affidavit of the complainant, there can be very little doubt of a concerted plan between Hall and Roberts to deprive the mortgagor of the power of paying the interest, on the day when it became due, for the purpose of compelling him to pay the principal monies for two years before the time of credit given by the condition of the bond and mortgage. The parties to the original agreement had an unquestionable right to make the extension of credit dependent upon the punctual payment of the interest at the times fixed for that purpose. And if, from the mere negligence of the mortgagor in

performing his contract, he suffers the whole debt to become due and payable, according to the terms of the mortgage, no court will interfere to relieve him from the payment thereof according to the conditions of his own agreement: *Steel v. Bradfield*, 4 Taunt. 227; *James v. Thomas*, 5 Barn. & Adol. 40. A court of equity, however, will not permit the mortgagee, or his assignee, to take an unconscientious advantage of the mortgagor who is willing to pay at the time prescribed, but who is unable to do so in consequence of the act of the other party; especially where there is reason to believe the default in payment was the result of a mere trick to defraud the mortgagor of his rights, by depriving him of the power of making the payment at the time prescribed. In this case it is evident that the defendant Clark was both ready and willing to pay the interest on his bond and mortgage on the day it became due. And if the assignee did not intentionally deprive him of the power of doing so, by keeping out of the way and concealing his place of residence, he transacted the business of the assignment in such an unusual manner as to produce the same result. Under the circumstances, if Roberts intended to take advantage of the neglect of the mortgagor to pay the interest at the day, it was his duty as an honest man to have given notice to Clark of the assignment, and of his residence, or the place where the payment could be made. As he neglected to do this or to put the assignment on record, so as to give the mortgagor the means of ascertaining who he was or where he lived, I am inclined to think the tender of the money to Hall at the day was sufficient to save the forfeiture. At least it is sufficient to authorize this court to interfere and stay the proceedings, upon the payment of the interest now due, until further default shall be made in paying the principal or interest at the times specified in the bond and mortgage.

The complainant appears to have acted in good faith in this case; as he had no reason to suppose, from the circumstances under which this bond and mortgage was sent to him, that Clark had been deprived of the power of paying the interest according to the terms of his contract. But as it was sent to him to be collected and applied to the payment of a prior indebtedness of Roberts, he sits in the seat of his assignor and can not be permitted to take advantage of the nonpayment of interest, which it would have been inequitable and unconscientious in Roberts to have done. And as the sum due for interest at the time of the filing of this bill was not sufficient to carry costs, the proceed-

ings of the complainant must be stayed upon the payment of the interest due on the tenth of February, without costs.

The case of *Johnson v. Houlditch*, 1 Burr. 578, is in point to show the authority of the court to interfere and stay the proceedings in such a case. There the plaintiff had kept out of the way to prevent a tender of the debt; and the court, upon the ground that the suit was oppressive, ordered the suit to be stayed upon payment of the amount due, without costs, although a technical right of action existed when the suit was brought. Costs were also refused in the case of *Adams v. Staton*, 7 J. B. Moo. 365, where the plaintiff's attorney had sued out a writ after he knew the defendant had called, for the purpose of settling the demand, but could not see him. An order must be entered in this case, that, upon the payment to the complainant or his solicitor, within twenty days, of the amount of interest due on the mortgage in February last, all proceedings upon the bond and mortgage mentioned in the complainant's bill be stayed, until default shall be made in the payment of principal or interest according to the condition of such bond and mortgage, and without reference to the default in the payment of interest heretofore due.

The doctrine of the principal case, that a condition in a mortgage that upon default being made in the payment of interest, the whole principal sum shall become due, has been repeatedly recognized in subsequent cases as being a valid condition which will be enforced in equity: *Hale v. Gouverneur*, 4 Edw. Ch. 209; *Ferris v. Ferris*, 28 Barb. 33; S. C., 16 How. Pr. 104; *Valentine v. Van Wagner*, 37 Barb. 60; S. C., 23 How. Pr. 401; *Rubens v. Prindle*, 44 Barb. 344, all citing principal case. In *Hunt v. Keech*, 3 Abb. 204, it was held that the commencement of a suit was a sufficient notice that the holder of a mortgage containing such condition elected to treat the whole sum due upon a failure to pay the interest as stipulated, citing principal case. Also cited in *Voorhees v. Presbyterian Church*, 8 Barb. 144; *Gruscy v. Schneider*, 50 How. Pr. 138; *Bennett v. Stevenson*, 53 N. Y. 510.

HAWLEY AND KING v. JAMES ET AL.

[7 PAIGE CH. 213.]

LANDS IN ANOTHER STATE—COURT OF CHANCERY HAS NO JURISDICTION to make a decree which will directly affect either the legal or equitable title to lands situated in another state.

TITLE TO REAL PROPERTY, and the validity or invalidity of a devise or conveyance thereof, depends upon the *lex rei sita*.

WHERE THE OBJECT FOR WHICH A CONVERSION of real estate into personalty fails, either wholly or in part, so that the proceeds thereof are not legally and effectually disposed of by the testator, there is a resulting trust in favor of the heirs at law *pro tanto*.

A TESTATOR DIED SEISED OF LANDS IN ANOTHER STATE which, by his will, he devised to his executors and trustees, to be sold, and directed the proceeds to be invested in lands in the state where he was domiciled at the time of his death, upon trusts which were illegal and void by the laws of that state: held, that there was a resulting trust in favor of the heirs at law as to the land devised, and that the executors and trustees would be decreed to transfer the legal title to such heirs.

WHERE A DEVISE OF REAL ESTATE UPON TRUST can not be carried into effect according to the intention of the testator, and is valid by the laws of the state where the property is situated, the courts of the state where the trustees are found may direct them to carry the will of the testator into effect, although such a devise of real property, situated in that state, would not be valid.

APPLICATION to the chancellor for further directions, pursuant to the provisions of the thirteenth section of the decree of the court for the correction of errors in this cause. By the latter clause of that section it was declared that the decree of that court should not be deemed a decision upon the title of the trustees to the lands of the testator situate in Illinois, or elsewhere out of the state of New York; but that the court of chancery should make such decree in relation to those lands as might be legal upon an application by any party interested therein, without prejudice to any party in consequence of the decree of the court for the correction of errors, and notwithstanding the provision for any such party in the will of the testator, was by such decree of the appellate court declared to be void. The testator died seised of forty thousand acres of land in the military bounty tract in the state of Illinois. By the master's report it appeared that the will was executed to pass real estate by the laws of Illinois, in force at the testator's death, and that the widow was entitled to dower in such lands by the laws of that state. It also appeared that the English common law and all acts of parliament of a general nature in aid of the same as they existed prior to the fourth of James I., with two or three specified exceptions had been adopted and recognized as in force by the legislature of Illinois; and that there was no statute in that state inhibiting or modifying trust estates as authorized by the common law.

J. King, for the complainants.

J. C. Spencer, for the heirs at law.

D. D. Barnard, for Anna McBride James.

A. C. Paig, for the other *cestuis que trust*.

W. L. G. M. (Chancellor. This court has no jurisdiction to

make a decree which will directly affect either the legal or equitable title to lands situated in another state. And if the legal title to the lands now in question was in any of the infant parties according to the laws of Illinois, or if those who had the legal title were out of the jurisdiction of this court so that it would be impossible for it to operate upon them personally, to compel them to execute the trust or to convey the legal title according to the decree, I should consider it my duty to dismiss the application, and to refer the parties to the courts of the state where the trust property is situated. This court, however, can not decline the jurisdiction of the case, especially under the directions of the decree of the court of *dernier ressort*, so long as it has the power to execute its decision through the medium of the holders of the legal title: See *Lord Portarlington v. Soulby*, 3 My. & K. 104; *Bunbury v. Bunbury*, 3 Lond. Jur. 644.

But it is a well-settled principle of the common law, that the title to real property, and the validity or invalidity of every devise or conveyance thereof, must depend upon the *lex rei sitæ*. The law of Illinois must therefore be resorted to, not only for the purpose of determining the question whether the title to these lands is in the trustees, or in the *cestuis que trust* under the will, but also to determine the legal and equitable rights of the several parties under this testamentary disposition of the testator's property. By the principles of the common law, which have been adopted in Illinois, all or nearly all of the trusts of this will are valid, so far as they appear upon the face of the will itself. And as the will contains a direct devise of the lands to the trustees, with a direction to sell the same, and convert them into money for the purposes of the will, I think there can not be a reasonable doubt that the legal title to the Illinois lands is in the trustees, according to the *lex rei sitæ*. And if the trusts in the will in relation to this part of the property can be carried into effect, either in that state or elsewhere, according to the intention of the testator, the courts of that state would have no difficulty in sustaining the devise of these lands; and the trustees would be decreed to sell the same according to the directions of the testator, in his will.

It remains for me, therefore, to consider whether it is possible for the trustees to carry into effect these trusts; for if the object for which a conversion of real estate into personalty is directed fails either wholly or in part, so that the proceeds thereof are not legally and effectually disposed of by the testator, there is a resulting trust in favor of the heirs at law *pro tanto*. In other

words, there is no equitable conversion of the property in such a case, and it is in equity still considered as real estate, and descends to the heirs of the testator. In this case, as the testator's personal estate was more than sufficient to pay his debts, and to satisfy all the purposes of the will to which his personal property could be applied according to the law of his domicile, the only ground for converting the Illinois lands into personalty, consistently with the declared intention of the testator, is that the proceeds thereof may be invested in real estate in the cities of Albany or New York, or in the village of Syracuse, upon trusts which the courts of this state have declared to be illegal and void. And as the impossibility of investing the proceeds of the land upon such a trust existed at the death of the testator, so that no right or interest ever vested in the *cestuis que trust*, this court can not consider the property as equitably converted at that time; so as to authorize a decree for a different investment thereof *cy-pres*. The court for the correction of errors having decided, that neither the real nor the personal estate of the testator in this state could be taken and applied for the purpose of raising the portion of Anna McBride James, in real estate here, consistently with the intentions of the testator and the laws of this state, nor could it be invested in lands here for any of the purposes of the trust, except as provided for in the decree, this court can not authorize the proceeds of the Illinois lands to be so applied, without entirely abandoning the principles upon which that decision of the court of *dernier ressort* rests. And it certainly could not have been the intention of the testator that the trustees should assign to Anna McBride James, and Lydia, and the children of Augustus, any of the lands in the state of Illinois; which lands he directed such trustees to sell, for the purpose of vesting the proceeds thereof in the purchase of lands here.

The conclusion at which I have arrived in this case, and which must be declared in the decree to be made on this application is, that the legal title to the lands in the state of Illinois, subject to the widow's right of dower therein, is now in the trustees under the will, according to the laws of Illinois, but that the whole equitable interest therein is in the heirs at law of the testator, as a resulting trust. The trustees must therefore convey the same to such heirs, by a conveyance duly executed to pass the legal title according to the laws of Illinois, and to be recorded according to the laws of that state. The taxable costs of all parties on this application, and the expenses of carrying into effect this order, and all taxes, etc., paid by the trustees

which have not already been allowed to them, are to be paid out of the personal estate of the testator in the hands of the executors.

The doctrine of the principal case, that where the object for which a conversion of real estate into personalty is directed by a will fails, there is a resulting trust in favor of the heirs at law, is approved in *King v. Rundle*, 15 Barb. 150, and *Cutter v. Doughty*, 7 Hill, 307, citing principal case. See also *McCarty v. Terry*, 7 Lans. 238.

LEX REI SITÆ GOVERNS DISPOSITION OF REALTY: *Sneed v. Ewing*, 22 Am. Dec. 41.

McNAMARA ET UX. v. DWYER ET AL.

[7 PAIGH CH. 239.]

A FOREIGN EXECUTOR OR ADMINISTRATOR CAN NOT MAINTAIN A SUIT in this state by virtue of letters testamentary, or of administration granted abroad.

COURT OF CHANCERY MAY COMPEL A FOREIGN EXECUTOR OR ADMINISTRATOR to account for the trust funds which he received abroad and brought with him into this state, upon a bill filed for that purpose by the next of kin of the decedent, without letters of administration on the estate of the decedent being issued here.

UPON A BILL FILED FOR THAT PURPOSE, if the foreign administrator or executor is about to leave the state, he may be arrested upon a *ne exeat* and held to equitable bail, as in other cases.

WHERE A BILL IS FILED AGAINST A FOREIGN EXECUTOR OR ADMINISTRATOR for assets received by him in the place where he was appointed, and brought into this state, the nature and extent of his liability depends upon the laws of the state or country from which he derived his authority to administer the assets of the decedent.

SUCH ASSETS MUST BE DISTRIBUTED among the next of kin, or applied to the payment of debts, in the same manner as though the remedy was sought by the creditors or distributees at the place of the appointment of such executor or administrator.

A NE EXEAT WILL BE DISCHARGED, as of course, upon the defendant giving security to answer the complainant's bill, and to render himself amenable to the process of the court pending the litigation, and to such process as may be issued to compel a performance of the final decree.

APPLICATION by Dwyer to discharge a *ne exeat*, on which he had been arrested and held to bail in the sum of fifteen thousand dollars; or to reduce the bail and permit him to leave the state; upon giving the usual security to answer the complainants' bill and to render himself amenable to process of the court. Dwyer resided at New Orleans, and the complainants in this state. The bill was filed for an accounting and distribution of the estate of P. McKeogh, who died in Ireland, and of whom the wife

of McNamara was next of kin. The bill alleged that Dwyer was appointed administrator of the estate in Ireland, and that he had converted a large amount of the personal estate of the decedent into money, and had brought it to this state, and had subsequently misapplied the same in certain private speculations. That the complainants' share of the personal estate exceeded the sum of ten thousand dollars. The petitioner set forth in his petition, among other things, that he had given security in Ireland upon being appointed administrator in the sum of one hundred thousand dollars; that an attempt had been made there to substantiate a will of the deceased, and that other claims were made against the estate there; also that the complainants would not be entitled over and above what they had already received, to more than four thousand dollars. The other facts appear in the opinion.

William Mulock, for the petitioner.

C. O'Connor and A. L. Robinson, for the complainants.

WALWORTH, Chancellor. There can be no reasonable doubt as to the right of the complainants to require of the petitioner equitable bail in this case, if the court has jurisdiction to call a foreign administrator to account, at the suit of the next of kin, for the personal assets of the decedent received abroad and brought into this state. The converting of the fund into real estate, instead of paying it over to the distributees or vesting it upon proper securities, was a breach of trust as to the complainants, who had not consented to this disposition of the fund. And the revised statutes have authorized executors and administrators to be holden to bail in actions brought to charge them with waste, upon affidavit of the fact that such waste or misapplication of the funds of the estate has been committed: 2 R. S. 448, sec. 34. Even if the petitioner was a resident, he would not be exempted from arrest, upon due proof of a misapplication of the fund in his hands as administrator and that he was about to leave the state; as the act to abolish imprisonment for debt does not apply to arrest upon meane process out of this court, in cases of exclusively equitable cognizance: *Brown v. Haff*, 5 Paige, 235. Besides, it is distinctly alleged in the bill that the defendant John Dwyer had not been a resident of this state for one month previous to the commencement of this suit.

It appears to be perfectly well settled that a foreign executor or administrator can not maintain a suit in this state by virtue of letters testamentary or of administration granted abroad. And

the learned and very distinguished American commentator on the conflict of foreign and domestic laws is, evidently, of the opinion that this principle extends to suits brought against the foreign executor or administrator, to recover the property which he has received in that character: Story Conf. L. 422, *see* 513, 514. I have, however, after a careful examination of the several cases referred to by him, not been able to find any one in which it has been directly decided that the remedy against an executor or administrator, either in behalf of the next of kin or of the creditors, is necessarily confined to the courts of the country in which the letters testamentary or of administration were granted. Indeed, to suppose such was the law, would lead to the conclusion that cases must frequently exist in which there would be a total failure of justice. It is well known, as a general rule, that executors are not required to give security upon the granting of letters testamentary to them; so that if they remove to another state, or country, taking the proceeds of the testator's property with them, there would be no possibility of compelling them to account for the same by a resort to the tribunals of the state or country where probate of the will was originally made. And even in the case of an administrator who had given security to account, the remedy there might be unavailing, in consequence of the insolvency of his sureties.

I admit that in the enforcement of the remedy, against the personal representative of the decedent, in the tribunals of another government, respect must be had to the nature and extent of his liability according to the laws of the state or country from which he derived his authority to administer the assets of the decedent; so far at least as respects that part of such assets as were within the jurisdiction of the state or country from which he derived such authority. Those assets must be distributed among the next of kin, or applied to the payment of debts, in the same manner as though the remedy was sought by the creditors, or distributees, at the place of his original appointment, although he may have removed with the assets to another country. Certainly, if a guardian appointed in one of our sister states should come into this state with the property of his ward, or after he had squandered the same, or appropriated it to his own use, in the state where he received his appointment, there could be no reasonable doubt as to the jurisdiction of this court, to compel him to account for and pay over to his ward what was justly due according to the laws of the state in which he assumed the trust. And I confess I can see no reasons for giving

such a remedy here, in the case supposed, which would not be equally applicable to the case of an executor or administrator coming into this state and bringing with him the property which had been confided to him as trustee for the creditors or next of kin of the decedent. In the case of *Logan v. Fairlie*, 2 Sim. & Sta. 248,¹ where an executor appointed in India, and who had proved the will there, remitted the proceeds of the estate to his agents in England to be paid over to the residuary legatees who happened to reside there, Sir John Leach supposed it was necessary for the legatees to procure the appointment of an administrator in England, to enable them to recover the fund. No case, however, is referred to in support of that opinion, which was only expressed incidentally, as a decree had already been made on the bill of the legatees. And it appears also to be opposed to the decision of the court of appeals in Virginia, in the case of *Wernick v. McMurdo*, 5 Rand. 51, where it was held that the creditors, legatees, or distributees of the decedent, and not the administrator *de bonis non*, were the proper persons to sue for the proceeds of the estate which had been wasted or misapplied by the former executor or administrator.

The case of *Campbell v. Thusey*, 7 Cow. 64, only decides that a foreign executor or administrator can not be sued as such, by a creditor of the decedent, in a court of law in this state. But even that case shows that the creditors and legatees are not without remedy, in a case where the foreign representative has brought the assets into this state; though I confess I have some doubt whether he ought to be called to account therefor, in a court of law, as an executor *de son tort*. But I can see no valid objection to a suit against him in this court, where he may have the full benefit of his administration of the estate abroad; and where full and ample justice can be administered without regard to the technical form of the suit. I have therefore no doubt but that this court has jurisdiction to compel the defendant, J. Dwyer, to account for and to pay over to the complainants their distributive share, of the estate of the decedent, which had been received by him in his character of administrator in Ireland, and which was brought into this state on his return from that country in January, 1837; and that, too, without taking out letters of administration here. On such accounting, however, the defendant will be entitled to all such allowances as, by the laws of Ireland, he would be entitled to in a suit brought against him for an account and settlement of his trust in the courts of that country.

The claims made against the estate in Ireland form no valid objection to this suit; for if those claims are well founded the administrator should pay them as soon as he is satisfied of that fact, and should pay over the balance in his hands to the distributees, and if the validity of such claims can not be ascertained in time to provide for the payment thereof in the final decree in this suit, the complainants will not be allowed to receive their distributive share of the estate until they give satisfactory security to the court to refund, in case any claims are thereafter established against the administrator, which the assets hereafter to be received in Ireland are insufficient to meet. This *ne exeat* was properly allowed, upon the facts stated in the complainants' bill. The petition to discharge the *ne exeat* must therefore be denied.

But under the general prayer of the petition for further relief the amount for which the petitioner has been held to bail may be reduced; and he may have the *ne exeat* discharged as a matter of course, upon his giving the usual security, to answer the complainants' bill and to render himself amenable to the process of the court pending the litigation, and to such as may be issued to compel a performance of the final decree. It only remains for me to inquire whether the amount of the security required upon the *ne exeat* is too high; and to prescribe the terms upon which the writ is to be discharged. The amount of the complainants' claim, as sworn to, is undoubtedly founded upon the supposition that the defendant will hereafter be able to collect the debts still due in Ireland, and that the claims against the personal estate of the decedent will not be substantiated. But the defendant's letter, which is principally relied upon to show the amount of the estate, shows that but little can be expected from that source; though from the petition it would appear that the administrator expects to recover enough to pay the complainants' distributive share, which he estimates at not more than four thousand dollars beyond what they have already received.

Presuming for the present, therefore, that the claim of Mrs. Eyre against the estate will be established, it will exhaust the probable amount of assets hereafter to be received in Ireland; leaving the administrator to account only for the funds and plate mentioned in his letter of July, 1837. Those funds, upon the supposition that there was no stock in the bank of Ireland, and excluding the bonds not collected, do not much exceed forty-five thousand dollars. After making a liberal allowance for the commissions of the administrator and the expenses of adminis-

tration, beyond what he has probably received for the difference in exchange, the complainants' share of this fund will not probably exceed six thousand five hundred dollars in addition to what they have already received. The amount in which the defendant is held to bail upon the *ne exeat*, should therefore be reduced to nine thousand dollars, as that will be sufficient to cover what will probably be found due to the complainants, with interest and costs. And the *ne exeat* is to be discharged absolutely, upon the petitioner's filing with the assistant register a bond, in the usual form, with two sufficient sureties, in the sum of nine thousand dollars, to be approved of by the vice-chancellor or the injunction master of the first circuit; or upon his depositing with the assistant register the sum of seven thousand dollars, to be invested in the trust company, on interest, to abide the further order of the court.

EXECUTOR OR ADMINISTRATOR, LIABILITY OF, IN A FOREIGN JURISDICTION, FOR PROPERTY OF DECEDENT.—The question whether an executor or administrator is liable in a state or country other than that in which he was appointed, for property of the decedent received by him, and brought within such other state or country, is one upon which the authorities are not uniform. In the principal case it was held that such executor or administrator was so liable, and that a court of equity would compel him to account to the legatees or heirs of the deceased for such property, although no letters of administration had been issued in the state or country where such property was taken. The principal reason advanced by the New York cases for the exercise of this jurisdiction, is that it is necessary to prevent a failure of justice. Upon principle, there seems to be no valid objection to such jurisdiction being entertained, inasmuch as both the executor or administrator and the property for which an accounting is sought, are within the jurisdiction of the court, and consequently amenable to its orders and process; and in maintaining such a suit courts of equity simply exercise the jurisdiction over trusts and trustees which has ever been conceded to belong to them. These views of this question have been advanced in subsequent adjudications in New York, and at least so far as that state is concerned, the question is now settled in favor of the jurisdiction: *Brown v. Brown*, 4 Edw. Ch. 346; *Ordronaux v. Helie*, 3 Sandf. Ch. 518; *Slatter v. Carroll*, 2 Id. 584; *Brown v. Brown*, 1 Barb. Ch. 196; *Gulick v. Gulick*, 33 Barb. 102; S. C., 21 How. Pr. 26; *Field v. Gibson*, 56 Id. 233; *Matter of Webb*, 11 Hun, 126; *Brown v. Knapp*, 17 Id. 161, all citing the principal case with approval upon this point; but see *Vermelyn v. Beatty*, 6 Barb. 431, 432, also citing the principal case upon this point. In *Campbell v. Tousey*, 7 Cow. 64, it was held that, although an executor or administrator appointed in a neighboring state can not be sued in New York, yet that if he collects effects of his testator or intestate, and brings them into that state, he may be sued there as an executor *de son tort*, and chargeable for all assets he has not applied in due course of administration, whether received abroad and brought there or received there; and in *Gulick v. Gulick*, 33 Barb. 102, the principal case was stated to have been decided in conformity with the doctrine enunciated in *Campbell v. Tousey*, *supra*. See, also, remarks of Vice-chancellor McCoun in *Brown v. Brown*, 4 Edw. Ch. 346

Mr. Story, in his work on the conflict of laws, seems to doubt whether the principal case can be sustained upon principle: Story Conf. L., 7th ed., secs. 504 a, and 513, and notes thereto. A different view, he says, has been adopted by the supreme court of the United States; and from an examination of some of the decisions of that court, such appears to be the case: *Vaughan v Northup*, 15 Pet. 1; *Peale v. Phipps*, 14 How. 375, and cases there cited. See also *United States v. Union Pac. R. R.*, 11 Blatchf. 390; and *Mellus v. Thompson*, 1 Cliff. 131. The general rule referred to in the principal case, that a foreign executor can not, by virtue of his appointment, maintain an action in the courts of another state, is also approved in subsequent cases: *Lyman v. Parsons*, 28 Barb. 572; and *Metcalf v. Clark*, 41 Id. 48, also citing principal case. In *Gleason v. Bisby*, Clarke Ch. 556, it was held, upon the authority of *McNamara v. Dwyer*, that, upon the issuance of a writ of *ne exeat*, it should be marked by the officer allowing it, in the sum which the defendant is held to bail, and that such sum should only be sufficient to cover the complainant's demand.

FOREIGN ADMINISTRATOR, POWERS AND DUTIES OF: *Hunder v. Bryson*, 25 Am. Dec. 313; *Glenn v. Smith*, 20 Id. 452 and nota. The authority of a curator of an estate does not extend beyond the limits of the jurisdiction under which he is appointed: *Schneller v. Vance*, 28 Id. 140.

SAFFORD v. SAFFORD ET AL.

[7 PAIGE CH. 269.]

TO ENTITLE A WIDOW TO DOWER, the husband must in his life-time have been seised of a present estate in possession in the premises, and the right to dower can not extend to any part of the premises over which such present estate or interest did not vest in possession during the coverture.

WHERE A DECEDENT TAKES HIS ESTATE BY DESCENT from an ancestor whose widow is entitled to dower in such estate, and which she afterwards claims and has set off to her, the decedent's present estate in that part of the property is considered as suspended, by relation, from the time of the descent cast upon him, so that if he dies in the life-time of such dowress, his own widow can never be entitled to dower in that third of the estate, even after the death of the first dowress.

WHERE A FATHER DIED SEISED OF LANDS which descended to his son subject to the mother's life estate in one third thereof as her dower, and the son afterwards died in the life-time of his mother, leaving a widow, the latter is not entitled to dower in that third of the premises, either during the life of the mother or after her death.

WHERE THE RIGHTS OF INFANTS APPEAR UPON THE FACE OF THE MASTER'S REPORT as to title in a partition suit, the court will correct an error into which the master has fallen as to the extent of their interests in the premises partitioned, although no formal exception has been pleaded to the report by their guardian *ad litem*.

BILL for partition of a farm formerly owned by Levi Safford, the father of complainant, and the grandfather of the five infant defendants. The widow of Levi, and the grandmother of the infants, was still living and entitled to dower in the premises.

The master's report showed that the infants' father died shortly after the death of their grandfather, leaving a widow; who, by the report, was entitled to dower in the whole of the infants' interests in the premises.

Hamilton, for the complainant.

J. Porter, guardian for the infants.

WALWORTH, Chancellor. The master's report as to the interest of the several parties in the premises is correct, except as to the supposed right of dower of the widow of John Safford in the interests of her infant children. To entitle the widow to dower, the husband must in his life-time have been seised of a present estate or interest in possession in the premises. And his widow's right of dower can not extend to any part of the premises as to which such present estate, or interest, did not vest in possession during the coverture. And where the decedent takes his estate by descent from an ancestor whose widow is entitled to dower in such estate, and which she afterwards claims and has set off to her, the decedent's present estate in that part of the property is considered as suspended, by relation, from the time of the descent cast upon him; so that if he dies in the life-time of such dowress, his own widow can never be entitled to dower in that third of the estate, even after the death of the first dowress. The maxim *dos de dote peti non debet*, applies with full force to such a case: *Bustard's case*, 4 Co. 122 b; Co. Lit. 316, and Hale's note. This principle appears to have been entirely overlooked by the master and by the guardian *ad litem* of the infant defendants. But in a case of infants where the whole facts appear upon the face of the master's report upon the title, the error may be corrected by the court, although there has been no formal exception filed, by the guardian *ad litem*, to the report.

The decree must therefore declare that G. Safford is only entitled to dower in two thirds of the shares or interests of her infant children; and is not entitled to any dower, either present or future, in the other third thereof, as to which their grandmother is to be considered as tenant in dower. And the decree must direct a sale and distribution accordingly.

EVIDENCE OF MARRIAGE, WHAT SUFFICIENT, IN CASES OF DOWER: *Sellman v. Bowen*, 29 Am. Dec. 524.

DOWER.—In *Den v. Frew*, 22 Am. Dec. 710, the effect of an execution sale against the husband upon the wife's right of dower is considered: See *Combe v. Young*, 26 Id. 225. As to what a wife must do to bar her right of dower, see *Catlin v. Warr*, 6 Id. 56; *Chase's case*, 17 Id. 277; *Leavitt v. Lamprey*, 23 Id. 685.

L'AMOUREUX v. VANDENBURGH ET AL.

[7 PAIGE CH. 316.]

- A PRIOR MORTGAGEE OR CLAIMANT OF PROPERTY** who encourages or in any way acts in the negotiation or consummation of a subsequent transfer of that property which is inconsistent with such prior right, and at the same time conceals from the purchaser the knowledge of the existence of his claim, will not be permitted afterwards to set up such prior right against the purchaser or his grantee.
- A MORTGAGEE WHO HAS BEEN GUILTY OF A FRAUDULENT CONCEALMENT**, which deprives him in equity of the right to enforce his lien against the premises mortgaged in the hands of a purchaser from the mortgagor, can not, by a subsequent assignment of the mortgage, give to the assignee a right to enforce such lien.
- AN ATTORNEY WHO, WHILE HOLDING A MORTGAGE** upon certain premises, is employed by the mortgagor to draw a deed and assist in conveying a part thereof to a third person having no knowledge of such mortgage, and who pays full value therefor, and from whom the existence of such mortgage is concealed, will not be permitted in equity to enforce the lien of his mortgage against the part of the premises conveyed to such purchaser.

APPLICATION by Vandenburg to set aside a decree against him, and a sale of his lot in pursuance thereof, and all proceedings had in this cause against him, for irregularity as well as upon the merits. The bill was to foreclose a mortgage given by Alexander O. Spencer to L'Amoureux and Van Epps in July, 1835, upon several lots of land in Greenbush, including lot No. 39, now owned by Vandenburg. In February, 1836, Spencer sold and conveyed lot No. 39 to petitioner in exchange for other lands in Albany, without informing the latter of the mortgage. In making this exchange, Van Epps, one of the mortgagees and the law partner of the other, was employed by Spencer to draw the deed to Vandenburg, and to receive a proper conveyance of the Albany property in exchange therefor. The exchange was made without the petitioner being informed of the mortgage, and he swore positively that at the time of the exchange both Spencer and Van Epps assured him that there were no liens or incumbrances on the premises conveyed; and that he believed these assurances were made in the presence of L'Amoureux. In answer to this part of the petition L'Amoureux stated that his partner took the mortgage, and he did not know at the time what lands were included in it, and that he did not know, according to his recollection and belief, that the petitioner had purchased a part of the land included in the mortgage until about the time of making the search, with a

view to foreclose the mortgage. But whether he was present when the exchange was made was not stated. Spencer's affidavit stated that he did not recollect that anything was said at the time of the exchange about the mortgage. Van Epps swore that he was not employed by Vandenburg, but by Spencer, in making the exchange, and that he should have thought it wrong to have volunteered information which would have prejudiced his employer. About a month after the exchange Van Epps assigned all his interest in the bond and mortgage to L'Amoureux. The bill to foreclose the mortgage was filed in February, 1838, in which a large number of persons were made defendants. The facts as to the service of the papers are sufficiently referred to in the opinion.

J. V. N. Yates, for the petitioner.

H. V. D. Van Epps and M. T. Reynolds, for the complainants.

WALWORTH, Chancellor. Two questions of importance arise in this case: First, whether the petitioner had a meritorious defense which he might have availed himself of in this case if he had employed counsel and attended to it in season? Secondly, whether the proceedings against him have been such as to entitle the complainant to hold the petitioner's house and lot under the decree and master's sale?

In relation to the first question I am fully satisfied that the petitioner had a valid equitable defense to this suit; so far as it sought to subject his lot to the payment of any deficiency which might be due on this bond and mortgage, after selling the residue of the mortgaged premises subject to the lien of the commissioners of loans. The complainant and his partner Van Epps were the joint holders and owners of this mortgage when the latter was applied to as a lawyer to prepare the deed to the petitioner, and to receive a conveyance from him to Spencer for other property in exchange. And although L'Amoureux had no personal notice of the transaction, and probably did not know what his partner was doing, even if he was present in the office at that time, yet the business was undoubtedly of a character which entitled him to share in the profits thereof as a partner, although he did not draw the deed himself. Whether this was so or not, if Van Epps has done an act which deprived him of the equitable right to enforce the collection of this bond and mortgage against the land conveyed to the petitioner through his instrumentality, he can not by subsequently assigning his interest in the mortgage to his partner, give to the latter a right, as against

the lot conveyed to the petitioner, which the assignor did not himself possess. In other words, the assignee of this chose in action took it subject to all the equities which existed against it in the hands of the assignor. And if by a concealment of the real facts of the case from the complainant, Van Epps has induced him to pay more for his interest in the bond and mortgage than it was really worth, or has suffered the complainant to release other parts of the mortgaged premises from the lien of the mortgage by concealing from him the fact that a part of the premises had already been conveyed to a *bona fide* purchaser, as he swears he did, the complainant must look to his copartner and assignor for his remuneration for the injury.

Although Van Epps denies that he told the petitioner, in express terms, that there were no liens or incumbrances on the property which Spencer was conveying to him, as sworn to by the petitioner, yet he admits in substance that he concealed from Vandenburg the fact that himself and L'Amoureux then held a mortgage, of five thousand dollars, which covered the premises Spencer was then conveying to him with warranty; and for which he knew the petitioner was then paying a full price by the conveyance of other property in exchange therefor. This, except so far as the mere question of personal veracity is concerned, is the same thing as if he had told him there was no incumbrance on the property. For as he knew that Spencer was receiving the full value of the property from the petitioner, it was his duty to speak and let the vendee know that Spencer was imposing upon him by conveying to him, with warranty, property which had been previously mortgaged to Van Epps and his partner. And the excuse of Van Epps, that he thought it would be wrong to volunteer a statement which might be prejudicial to his employer, is one that can not avail him in a court of equity. Mr. Justice Story very properly applies to the prior incumbrancer, in such cases, the maxim that it is a fraud to conceal a fraud: 1 Story Eq. 379, sec. 390. Nor will the fact that the prior incumbrancer concealed the knowledge of his claim from the subsequent purchaser, or mortgagee, from prudential motives, or from a mistaken sense of duty to his employer, avail him here; where the equitable rule is that he who does not speak when conscience and a just regard to the rights and interests of others require him to speak, shall not be permitted afterwards to assert his claim to their injury: *Pote v. Pote*, 1 Vern. 239.¹ It is not necessary to inquire whether a mere stranger to the transaction who

1. Error.

knows that other parties are in a treaty for the purchase of property on which he has a lien or claim is bound to give notice of such claim.

In *Mocatta v. Murgatroyd*, 1 P. Wms. 363,¹ Lord Cowper held that a prior mortgagee who merely witnessed the subsequent conveyance or mortgage without disclosing his claim upon the mortgaged property, should be postponed. His lordship in that case relied upon the presumption that the subscribing witness knew the contents of the instrument he witnessed. I agree, however, with the opinion afterwards expressed by Lord Thurlow, that the case of *Mocatta v. Murgatroyd* was wrongly decided, if there was no other evidence of the fact that the prior mortgagee knew than the mere constructive notice arising from the circumstance that he had witnessed the deed. For, as Lord Thurlow justly remarks, it is well known that in practice witnesses are not always privy to the contents of the deed to which they subscribe their names: 1 Bro. C. C. 357. And to deprive a third person of his right upon the ground of fraud, he must at least be conscious of the treaty in which the fraud was practiced. In this case, however, Van Epps, one of the prior mortgagees, not only had notice of the treaty to exchange the property between Spencer and the petitioner, and that the latter was to have a warranty deed of the lot in question, but he was actually employed as the attorney of Spencer to assist in making that exchange of property. He also admits he drew the deed to the vendee without informing him of the existence of his prior mortgage. And I have not been able to find any case on this subject, where the prior incumbrancer or claimant not only was cognizant of the negotiation but actually encouraged or assisted therein, in which his claim was permitted to stand against the *bona fide* purchaser or mortgagee from whom he had concealed the fact of the existence of such prior claim; except where he was himself ignorant of such prior claim. In the case of *Berrysford v. Milward*, Barn. Ch. 101, Lord Hardwicke granted a perpetual injunction against a mortgagee who was casually present at a negotiation, between the mortgagor and another as to a marriage settlement on the marriage of their children, and concealed the fact of his mortgage from the father of the intended bride, but made a verbal promise to the mortgagor to rely upon his personal security only. And the chancellor there refers to another case, where a perpetual injunction was granted against a mortgagee who had engrossed a deed of settlement without

1. 1 P. Wms. 393.

disclosing that he had a mortgage on the estate; and that, too, although the mortgagee was not of age at the time he engrossed the deed. The case referred to I presume is that of *Clere v. The Earl of Bedford*, referred to by Viner, 13 Vin. Abr. 536, Fraud, 2, and in the cases of *Savage v. Foster*, 9 Mod. 38, and *Hunden v. Cheney*, 2 Vern. 150, where the same rule was applied to a *feme-covert*. And if the infant mortgagee, who as the mere clerk of the mortgagor, was called upon by him to engross the deed, was considered as guilty of a fraud in concealing the fact of his incumbrance from a subsequent mortgagee, or purchaser, certainly an adult attorney who does the same thing is not entitled to a greater indulgence than has been allowed to infants and *femes-covert*; although he thought it would be doing injustice to his employer if he volunteered the disclosure of facts which would have prevented the perpetration of a fraud. I take it therefore as settled law, that if the prior mortgagee, or claimant of property, either encourages or in any way acts in the negotiation or consummation of a subsequent transfer of that property which is inconsistent with such prior right, and at the same time conceals from the purchaser the knowledge of the existence of his claim, this court will not permit him afterwards to set up such prior right against the purchaser or grantee who would be defrauded thereby.

Van Epps and his copartner in the present case, therefore, had no right to enforce the lien of this mortgage against the land which they as attorneys had assisted in selling to the petitioner with warranty, in exchange for other property to the full value. And the subsequent transfer of the interest of Van Epps to his partner could not give to the latter a right which did not exist previous to that assignment; as the assignee took it subject to all equities which previously existed against it in favor of the petitioner. It is not necessary then that I should examine the question whether the subsequent release of other portions of the property to the extent of two thousand dollars, to the commissioners of loans, did not of itself, in equity, release the lot which had been previously conveyed to Vandenburg from the lien of this mortgage. Van Epps, who joined in the release to the commissioners of loans, certainly ought not to have concealed the fact from his own assignee that Spencer had previously sold a part of the mortgaged premises to a *bona fide* purchaser, and that by executing such release the assignee might endanger his security. Upon a full view of this case, therefore, I am satisfied it would be doing great injustice to the petitioner to permit this

decree to stand against him. And it only remains to be seen whether the decree against him has been irregularly as well as inequitably obtained.

If the suit was properly commenced against the petitioner, by the service of a subpoena upon him in which he was named as a party, the court would not, in ordinary cases, after a decree, be very astute in inquiring into mere technical irregularities for the purpose of opening the proceedings. But from the examination of the affidavits on both sides I am satisfied that the suit was never commenced against the petitioner by the service of any subpoena to which he was made a party. He swears positively that the only subpoena served upon or shown to him was the copy annexed to his petition, in which he is not named as a party to the suit. And as his name was not in the subpoena or in the notice, there was nothing in either to apprise him that an entry of his appearance would be required, even if he was not told that the service of these papers upon him was mere form. And the solicitor who served those papers does not say that he believes he told the petitioner that he was a party to the suit, or that it was necessary for him to enter his appearance and put in an answer, or that a decree would be entered against him for the sale of his land. Neither does the solicitor swear positively to the service of any subpoena, even by showing the same to the petitioner, in which he was named as a party. And an affidavit of mere belief is not sufficient to counteract the positive oath of the petitioner, supported as that oath is by the original affidavit of service, which was made and filed shortly after the copy of a subpoena was delivered. The solicitor is therefore undoubtedly mistaken in now supposing that he showed an original subpoena to the petitioner with the seal of the court attached to the same. The result is, that the whole proceedings as against Vandenburg, subsequent to the filing of the bill, have been wholly unauthorized, and must be set aside with costs to be taxed; unless the complainant stipulates to modify or amend his decree so as to exempt the lot of the petitioner from a sale under the same and from the lien of the mortgage, and also to pay the costs of this application. If such a stipulation is given, the decree must be amended accordingly, and then the sale as to the residue of the mortgaged premises is to stand and be confirmed. And the master in that case will make his report accordingly, and certify the balance due to the complainant on the decree; so that he may have an execution therefor against the property of the mortgagor. But if the decree is to be opened for the purpose of

litigating the rights of the petitioner upon the service of a new subpoena upon him, then the whole decree must be set aside; as it will be necessary to go again before the master, so as to give the petitioner an opportunity of contesting the amount due to the complainant on the mortgage, should he fail in proving his defense.

Cited in *Ely v. McNight*, 30 How. Pr. 100.

MOWATT V. CAROW ET AL.

[7 PAIGE CH. 328.]

WHERE AN INTEREST IN PROPERTY IS GIVEN BY WILL to one person, with a limitation over of the same interest either to his children or other persons upon the death of the first devisee or legatee before the time appointed for such interest to vest in possession, the death of the first devisee or legatee, although in the life-time of the testator, does not produce a lapse of the limitation over of that interest to the substituted objects of the testator's bounty.

WORDS IN A TESTAMENTARY DISPOSITION will be presumed to have been used in their ordinary or primary sense, unless it appears from the context of the will that they were used in some other sense; or, unless, by reference to extrinsic circumstances, the use of the words in their primary sense would render the provision of the will insensible or inoperative.

"CHILDREN" IN COMMON PARLANCE DOES NOT INCLUDE "GRANDCHILDREN," or any others than the immediate descendants in the first degree of the person named as the ancestor; but it may include them where there are no persons in existence who would answer to the description of children in the ordinary sense of the word at the time of making a will; or where there could not be any such at the time or in the event contemplated by the testator; or where the testator has clearly shown, by the use of other words, that he used the word children as synonymous with descendants, or issue, or to designate or include illegitimate offspring, grandchildren or step-children.

WHERE, IN A LIMITATION TO THE SURVIVORS OF A CLASS of devisees or legatees, any of the class are *in esse* at the death of the testator so as to be capable of taking a vested interest, the survivorship is usually construed with reference to that time, so as to give the representatives of such of the class as die after the testator, the right to a share of the devise or bequest to the class.

WHERE A LEGACY OR DEVISE OF A RESIDUARY BEQUEST IS GIVEN TO TWO or more persons by name as tenants in common, or in severalty, or to be divided among them share and share alike, without any words indicating an intention of the testator to give the same over to the survivors, the shares of such persons respectively will become lapsed by the death of the legatee or devisee in the life-time of the testator; or, under the revised statutes, will go to their children or descendants if they are descendants of the testator.

WHERE A WILL HAS BEEN CORRECTLY CONSTRUED by the decree of the court below, the appellant who fails in reversing such decree, will be personally charged with the costs on appeal except in very special cases.

APPEAL from a decree of the vice-chancellor of the first circuit, dismissing the complainant's bill, filed to obtain a share of the estate of John Mowatt, sen., the complainant's great-grandfather, who died in March, 1829, leaving his will, which was executed in August, 1816. The testator had three children, Alexander, John, and Elizabeth, the first of whom died before the will was made, leaving two children, Elias and Jane, who were living at that time. John was married at the time the will was made, and had then three children living, John E., the complainant's father, Charles, and James. Elizabeth was also married to the defendant Carow, and was then the mother of a large family of children. The testator by his will devised to his widow a life estate in all his property. After providing for the widow of his deceased son, he directed the remainder of his estate to be divided as follows: "First. I give and bequeath unto my son John Mowatt, jun., one equal fourth part thereof; but in case he dies before my wife, I then give this his said share to be divided equally amongst his children, the survivors or survivor of them, share and share alike. Secondly. I give and bequeath to my daughter Elizabeth Carow one equal fourth part thereof; but in case she dies before my wife, I then give this her share to be equally divided amongst her children, the survivors or survivor of them, share and share alike. Thirdly. I give and bequeath to my granddaughter, Jane Mowatt, one equal fourth part thereof; but in case she dies before my wife, and leaving lawful issue, then my will is, that this her said share shall be given to her said issue, to be divided amongst them, the survivors or survivor of them, share and share alike. But should my said granddaughter die before my wife, leaving no lawful issue, then my will is, that her said share shall be considered as appertaining to my estate and subject to the division thereof. Fourthly. I give and bequeath to my grandson, Elias Mowatt, one equal fourth part thereof; but in case he dies before my wife, and leaving lawful issue, then my will is, that this his share shall be given to his said issue, to be equally divided amongst them, the survivors or survivor of them, share and share alike. But should my said grandson die before my wife, leaving no lawful issue, then my will is, that his share shall be considered as appertaining to my estate, and subject to the division thereof according to this my will." John Mowatt, jun., the testator,

died in 1821, leaving three children surviving him. His son, John E. Mowatt, married in 1824, and died about two months before the testator, leaving the complainant and another child, since dead, surviving him. Elias Mowatt, the testator's grandson, also died in the life-time of the testator, without issue, and unmarried. In January, 1835, the testator's widow died, leaving Mrs. Carow, Jane, the granddaughter, Charles, and James, two of the sons of John Mowatt, jun., and the complainant, their nephew, surviving her. The complainant claimed that the legacy to Elias Mowatt, the grandson, lapsed, by his death in the life-time of the testator, and that he was entitled to one ninth part thereof, as one of the heirs at law of his great grandfather; and that he was also entitled to share in the estate given to John Mowatt, jun., or his children, as the only son and representative of one of those children; or that the share of John Mowatt lapsed by his death in the testator's life-time, and that complainant was entitled to a share thereof under the statutes of descent. James Mowatt and the assignee of Charles Mowatt claimed that the whole of the share of J. Mowatt, jun., belonged to his two children, who survived the testator; and that the share of Elias did not lapse, but was by the will given to those who were entitled to the other three fourths of the estate, in the same proportion. The vice-chancellor sustained this last construction. and a decree was rendered accordingly.

J. Anthon and I. Scott, for the appellant.

D. Selden and E. Paine, for J. Mowatt, and Paine, the assignee of Charles Mowatt.

WALWORTH, Chancellor. There can be very little doubt in this case, what was the general intention of the testator, as apparent from the will itself. The testator drew his own will, as appears by an indorsement thereon in his handwriting; from which indorsement it also appears that the will was written by him the year before its execution. And if no events had occurred but those which probably were in the contemplation of the testator at that time, I presume this controversy would never have arisen. One of his sons was already dead, having left two children then in their infancy; and as the testator contemplated the possibility that one or both of them might die without issue, after the date of his will and before the time appointed for the division of his estate at the death of his widow, he made an appropriate provision to guard against a lapse of those shares by the death of the legatees in his life-time; and also to secure the share to the other

members of his own family, if either of the legatees should have died and should have left no issue living at the death of their grandmother. The vice-chancellor, therefore, is unquestionably right in supposing that the share of Elias, the grandson, did not become lapsed except as to his own presumptive right to the same, by his death during the life of the testator. For however much it may have been once doubted, it is now clearly settled that where an interest in property is given by will to one person, with a limitation over of the same interest either to his children, or to any other persons, upon the death of the first devisee or legatee, before the time appointed for such interest to vest in possession, the death of the first devisee or legatee, although in the life-time of the testator, does not produce a lapse of the limitation over of that interest to the substituted objects of the testator's bounty.

One of the earliest cases on this subject is that of *Ledsome v. Hickman*, 2 Vern. 611, where the testator devised three hundred pounds to each of his three daughters, at twenty-one, or marriage; and if any of them died before that time, her share to go to the survivor. One of the daughters having died in the life-time of the testator, the question arose whether the legacy was lapsed or should go to her two surviving sisters. Lord Chancellor Cowper decided that the limitation over was good as an executory devise. Although the reporter adds a *sed quære tamen* to the report of that case, it was followed by the same chancellor, eight years afterwards, in the case of *Bird v. Lockey*, Id. 744, and by Lord King in the subsequent case of *Will-ing v. Baine*, 2 P. Wms. 113.¹ It was probably urged in those cases, as in this, that there could be no legacy unless the legatee survived the testator; and that the legacy intended by the testator being lapsed, there was nothing to go over to the substituted legatees. The short answer to that, however, is that the bequest to the substituted legatees in such a case is an original legacy to them at the death of the testator; the event having then happened upon which their substitution in the place of the first-named legatee depended. And this is so whether such legacy to the substituted legatee is then vested, or is contingent and depending upon some future event. The principle that the legacy to the substituted legatees does not lapse by the death in the life-time of the testator of the legatee in whose place they are substituted by the will, is also fully recognized in several recent decisions in the court of chancery in England: *Humphreys v.*

1. 3 P. Wms. 113.

Howes, 1 Russ. & My. 639; *Gittings v. McDermott*, 2 My. & K. 69; *Le June v. Le June*, 1 Lond. Jur. 235; *Archer v. Jegon*, 1 O. P. Coop. 172.

In the case of *Williams v. Jones*, 1 Russ. 517, relied on by the appellant's counsel upon the argument, the event upon which the substitution was to take place never happened. The legacy was given absolutely to T. W. if he should be living at the time of the decease of the testator's wife; and if he was not, then it was to go to the son of T. W. But as the legatee actually survived the wife, although he died before the testator, the substituted legatee could not take according to the provisions of the will. Neither could he take as the legal representative of his father, as to whom the legacy was lapsed by death in the life-time of the testator. The same difficulty occurred in sustaining the substituted legacy in *Humberstone v. Stanton*, 1 Ves. & B. 485,¹ which depended on the event of the first legatee dying before he completed his apprenticeship; and he lived till after his apprenticeship was completed, but died before the testator. In the present case the event upon which the share of Elias Mowatt was to go over to the owners of the other three shares as the substituted legatees, actually happened, by his death without issue during the life of his grandmother. And if the legatees or substituted legatees of the other three fourths of the estate are entitled to those other shares as such legatees, they are entitled to the share originally intended for Elias, in the same proportions as the substituted legatees of that share; although he died in the life-time of the testator.

For the same reason, there can be no doubt as to the right of Charles and James to take two thirds, at least, of the share which their father would have taken in the estate if he had survived both the testator and the widow. For the contingency has happened upon which the children of John Mowatt, jun., were to be substituted in his place as legatees; to wit, his death during the life of his mother. It remains therefore for me to inquire and decide whether the other third of that share is devised to the complainant, in the events which have occurred, as one of the substituted legatees; or whether Charles and James are entitled to it as survivors of their brother; or whether it lapsed by the death of John E. Mowatt, as the substituted legatee of this third of that share, after the death of his father and in the life-time of the testator.

I can see no way in which the complainant can entitle himself

1. 1 Ves. & B. 335.

to this third, as a substituted legatee under the will, unless he can bring himself within the description of one of the surviving children of John Mowatt, jun., in the sense in which the testator intended to use the word children in this part of his will. As a general rule the testator must be presumed to have used words in their ordinary or primary sense, unless it appears from the context of the will that he probably used them in some other sense; or, unless by reference to extrinsic circumstances, the use of the words in their primary sense would render the provision of the will insensible or inoperative: *Wigram on Wills*, 29. The word children in common parlance does not include grandchildren, or any others than the immediate descendants in the first degree of the person named as the ancestor. But it may include them where it appears there were no persons in existence who would answer to the description of children in the ordinary sense of the word at the time of making the will; or where there could not be any such at the time or in the event contemplated by the testator; or where the testator has clearly shown, by the use of the other words, that he used the word children as synonymous with descendants, or issue, or to designate or include illegitimate offspring, grandchildren, or step-children: *Radcliffe v. Buckley*, 10 Ves. 195; *Earl of Orford v. Churchill*, 3 Ves. & B. 69. Testing the devise or bequest in this will, to John Mowatt, jun., or to his children if he died in the life-time of the testator's wife, by these rules, I can see nothing to authorize me to presume that he meant to include offspring of his son John in any more remote degree, or to use the word children as synonymous with issue. The event which has occurred was probably not provided for by the testator, because it was not contemplated by him as one that might happen during his life; although it now appears the event was not impossible. The testator was then seventy-six years of age, and his wife was probably very far advanced in life; and the three sons of his son John were then very young and unmarried. It was therefore very improbable that his own term of life would be prolonged until his grandchildren should be married and have issue, and that both the son and grandson would also die before him. For this reason he only made provision for the substitution of the children of John, as the legatees in the place of their father in the event of his dying before the time appointed for the distribution of the estate, with the right of survivorship among themselves if either of those children should die before the testator. The survivorship, where any of a class of legatees are then *in esse*, is con-

strued with reference to the death of the testator, when the legacy becomes vested in interest in the children living, but subject to open and let in after born children; so as to give the representatives of the children dying after that time the right to an undivided share of the legacy: *Drayton v. Drayton*, 1 Desau. 424.¹ *Woodstock v. Shillits*, 6 Sim. 416. But as the event which has actually happened in this case was not foreseen by the testator, and therefore was not provided for by his will, this court can not give the appellant a share of the legacy, under the description of a child of John Mowatt, jun., without making a will for the testator which he did not make for himself: *Doo v. Brabant*, 4 T. R. 709.

Where a legacy or devise or residuary bequest given to two or more persons by name, as tenants in common, or in severalty, or to be divided among them share and share alike, and without any words indicating an intention of the testator to give the same over to the survivors, the shares of such persons respectively will become lapsed by the death of the legatee or devisee in the life-time of the testator: *Page v. Page*, 2 Str. 820; *Bagwell v. Dry*, 1 P. Wms. 700; *Ackroyd v. Smithson*, 1 Bro. Ch. 503. The share of John Mowatt, jun., would therefore have become lapsed if he and all his children had died in the life-time of the testator; as there was no provision in the will which could have carried it to his more remote descendants, or to his sister, Mrs. Carow, or to his brother's children, as substituted legatees. The revised statutes now contain a provision for saving the legacy, or bequest, to the descendants of the legatee who dies in the life-time of the testator, if such legatee is himself a child or descendant of such testator: 2 R. S. 66, sec. 52. But even that provision, if it had been in force at the testator's death, would not reach the present case, as he had himself substituted other persons who were to take the whole legacy by survivorship in case his son died in the life-time of the testator's wife.

If the three children of J. Mowatt, jun., had been substituted by name to take the share of their father in equal proportions in severalty in case of his death, and without any words of survivorship, the share of John E. as one of the substituted legatees would have become lapsed by his death, during the life-time of the testator upon the principle which I have before stated. And in a case of that kind I presume the provision of the revised statutes above referred to would give that share of the fund to the descendants of the substituted legatee who died in the life-

1. See 1 Desau. 125.

time of the testator, his ancestor. But previous to the revised statutes it would have gone to the heirs or next of kin of the testator himself, as a part of his estate not effectually disposed of by the will. In the case of *Viner v. Francis*, 2 Cox Cas. 190. Lord Alvanley, as master of the rolls, decided that where a legacy was given to a class of persons in general terms, as in this case to the children of John Mowatt, jun., the share of one of the class who was in existence at the date of the will, and who died in the life-time of the testator, did not lapse; but that the whole fund, although bequeathed in terms indicating a tenancy in common rather than a joint tenancy among the individuals of the class, went to the residue of the class who survived the testator, or who afterwards came into existence previous to the time appointed by the testator for the distribution of the fund. Such a construction of a will, where there was no clause of survivorship and no substitution of the issue of such of the class as happened to die before the testator, would defeat this beneficial provision of the revised statutes in many cases; as such wills are very common. I am therefore happy to find that I can not sustain the claim of the two children of John Mowatt, jun., who were living at the testator's death, to the whole of their father's share, upon the principle that the *jus accrescendi* is necessarily implied where the legacy is given to a class, although in words not importing a joint tenancy.

The contrary was decided by Lord Thurlow in the case of *Martin v. Wilson*, 8 Bro. C. C. 324, a year or two after the case of *Viner v. Francis*, which of course overruled the decision of the master of the rolls; although some subsequent writers and annotators in England still think the decision of Lord Alvanley is more in accordance with the doctrine of the courts in analogous cases: See 1 Roper on Leg. 333; 2 Bro. C. C. 404, note. I will not say Lord Alvanley's construction might not be proper, for the purpose of effectuating the probable intention of the testator, where one of the class dies in the testator's life-time without issue. That intention, however, is usually indicated by words of survivorship which have reference to the death of the testator, and which have the effect to prevent the lapse of the share of one of the class who dies before the testator: *Lord Bindon v. The Earl of Suffolk*, 1 P. Wms. 96. It would hardly be reasonable, therefore, to adopt it where its effect would be to give the whole fund to the survivors of the class, to the entire exclusion of the descendants of the one who died after the making of the will. That being an event evidently not contemplated by the

testator in his will in such a case, unless there is something to indicate that intent, it is better that the lapsed share should go to the heir at law or next of kin of the testator; or that it should be left to go, as it now will under the provisions of the revised statutes, to the descendants of the individual for whom it was originally intended, if he is a descendant of the testator.

In the present case, however, the testator has made use of language which, according to the settled rules of construction, was sufficient to carry the whole share of John Mowatt, jun., to such of the children or substituted legatees as survived the testator. In *Smith v. Pybus*, 9 Ves. 567, the testatrix bequeathed a legacy to her mother for life, and after the termination of that life-interest she directed it to be divided equally between three *personæ designatæ*, or the survivor of them, in the order in which they were mentioned in the will. The sister who was first named in the will died in the life-time of the testatrix, leaving the other two sisters surviving. In that case it was adjudged that the words, "in the order they are now mentioned," as used by the testatrix, were not susceptible of any definite meaning; and that the word survivor carried the whole legacy over to the sisters who survived the testatrix, in equal proportions, to the exclusion of the personal representative of the sister who was dead. Here it is evident the testator did not intend to die intestate as to any part of his estate; as he directs it to be sold and converted into money for the purpose of distribution according to his will. And when he directs the share of John Mowatt, jun., in the event which has happened, to be divided equally among his children, the survivors or survivor of them, it must be presumed that he contemplated the possibility of the death of some of the children, and did not intend there should be a lapse in that event. No effect therefore can be given to these words in the will, according to the settled rules of construction, except by holding that the two children who survived the testator took the whole share originally intended for their father, including the one third of the original share of their cousin Elias.

The decree of the vice-chancellor was therefore right; and must be affirmed, with costs to be paid by the next friend of the appellant. As there was probable cause for litigating the question in the court below, it was a proper case to excuse the complainant from the payment of costs, and to charge the costs of the defense upon the fund in the hands of the executors belonging to all of the defendants. But after the several questions arising upon the construction of a will have been fairly decided

against the appellant by a competent tribunal, he ought not, except under very special circumstances, to be excused from the payment of costs upon his failure in the appellate court; and to be allowed to throw the costs of the adverse parties upon a fund belonging exclusively to themselves. Such an exercise of the discretion of the appellate court, in ordinary cases, would have a tendency to promote appeals and to protract litigation unnecessarily.

Cited upon the following points: That words used by a testator in making his will are presumed to be used in their ordinary or primary sense; especially where in other parts of a will different words are used to designate a person who is sought to be included in a bequest or limitation over to a class, by giving a secondary sense to the language which the testator has used to designate that class: *Matter of Hallet*, 8 Paige Ch. 378; *Hone v. Van Schaick*, 3 Edw. Ch. 477. That the word "children," when used in a will means descendants of the first degree: *Sherman v. Sherman*, 3 Barb. 387; see *Raines v. Hugson*, 60 Id. 606; and does not include a step-child: *Lawrence v. Hubbard*, 1 Bradf. 255. But if necessary to render the will operative, then the term "children" will be held to include grandchildren and descendants generally: *Guernsey v. Guernsey*, 2 Trans. on App. 156. That the word "children" is generally used in wills as a word of purchase and not of limitation: *Lytle v. Beveridge*, 58 N. Y. 605. That an ulterior devise or a gift, to take effect upon the defeasance of a former devise, will take effect whether the failure of the primary devise is by the happening of some event, as the death of the devisee in the life-time of the testator, so that the failure was absolute at the death of the testator, and the taking effect of the will, or by some event happening subsequently and after the first gift has taken effect, subject to the condition by which it is limited and may be defeated: *McLean v. Freeman*, 70 Id. 85; see also *Van Buren v. Dach*, 30 Id. 414; *Campbell v. Rawdon*, 19 Barb. 501; and *McLean v. Freeman*, 9 Hun, 250; *Anthony v. Brower*, 5 Trans. on App. 89. That where a life-tenant dies before the testator, but the party entitled in remainder survives him, the death of the life-tenant only extinguishes the life-estate, and the remainder-man is let in to the immediate right to the gift the moment the will takes effect: *Taylor v. Wendel*, 4 Bradf. 331; see to same effect *Downing v. Marshall*, 23 How. Pr. 7.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

WINSLOW v. ANDERSON.

[3 DEVEREUX AND BATTLE'S LAW, 9.]

ORDER REFUSING TO VACATE IRREGULAR JUDGMENT will be reviewed on appeal, where it appears from the record that such order was made by the lower court on the ground of a want of authority to vacate the judgment, and not in the exercise of a discretionary power.

JUDGMENT BY DEFAULT AGAINST THE PRINCIPAL AND SURETY upon a bond given for the appearance of a party in court at a particular day, is irregular if rendered prior to the day prescribed for the appearance of such person in the bond.

BOND EXHIBITED BY A DEBTOR TAKEN UNDER PROCESS OF EXECUTION, to secure his release, and conditioned for his appearance at the commencement of a subsequent term of court to be held on a particular day, is fully performed if the person by whom it is given appear upon the particular day named in the condition, notwithstanding the term of court specified may have commenced at a day previous.

AN IRREGULAR JUDGMENT MAY BE VACATED at a term of court subsequent to that at which it was rendered, upon motion made in due form for that purpose.

AN IRREGULAR JUDGMENT UNTIL SET ASIDE IS EFFECTIVE, subsisting, and valid as to all the world.

WINSLOW obtained a judgment against Anderson, in the superior court, upon which a *capias ad satisfaciendum* was issued returnable to the next term of court, to be held on the seventh Monday after the fourth Monday of September 1836. Anderson upon being arrested under the writ, to secure his release, gave to the sheriff a bond with Duckworth as his surety, containing a condition for the appearance of Anderson at the next superior court to be held for the county of Cumberland on the seventh Monday after the fourth Monday of March next. The bond was

dated October 9, 1836. The execution and bond were returned by the sheriff to the court at its spring term 1837, which began on the sixth and not on the seventh Monday after the fourth Monday of March. And at such time, the plaintiff, upon the failure of Anderson to appear, took judgment by default against him and his surety on the bond for the penalty. On the following Monday, the day mentioned in the condition of the bond, Anderson believing that to be the court day, appeared in accordance with the condition named, but found that judgment had been rendered against him the preceding week. The foregoing facts appearing upon the record and by affidavits, the defendants Anderson and Duckworth, at the next term of the court, moved to vacate the judgment. The motion was denied. From that decision the defendants appealed.

Caldwell, for the defendants.

Strange, for the plaintiffs.

RUFFIN, C. J. (after stating case). With any terms, which his honor might in his discretion have imposed as a reasonable condition of vacating the judgment, this court would have as little inclination, as it has authority to interfere, and we wish it further understood, that if the superior court had refused the motion upon an exercise of its discretion, we should not undertake to revise it here. But the record conclusively repels a presumption of that sort, since it explicitly states that the proceeding was irregular, and consequently ought to be corrected, and would have been corrected but for the want of power in the court to do so on motion. Our attention is therefore confined to the questions intended to be presented upon the record; which are, whether the judgment was irregular; and if it be, whether the superior court had the power to set it aside on motion.

An irregular judgment is one rendered contrary to the course and practice of the court. We take it, that this was an *ex parte* judgment by default, signed in the office for want of an appearance. So much is to be implied from the nature of the proceeding itself, and from the course of all the courts of the state. But in this case, the presumption is established by the declaration in the record, that the judgment was irregular, as well as erroneous; for a judgment rendered by the judge himself can not in a legal sense be irregular, however erroneous, since the course and practice of the court is established by the acts of the judge, and unless prescribed by statute can be altered from time to time by him. Could it then be regular in the course of any

court to take, without the actual interposition of the court, a judgment for the non-appearance of a party on a bond, when the judgment was taken on a day prior to that prescribed for his appearance in the bond? In general, a judgment taken without service of process; one signed out of term; one by default, before the proper period of the term; may be stated as well-understood instances of irregular judgment: *Skinner v. Moore*, 2 Dev. & B. 188 [30 Am. Dec. 155]. It is true, in this case no process is necessary under the statute, but judgment may be entered up *instantly* in case of failure to appear. But certainly the failure to appear must be a failure to appear on that day specified in the condition; for not appearing on any other day is not a default within that bond. To take a judgment by default before the day is therefore the same as signing judgment at one court, when the process is returnable to the next, or without service of process at all.

It is said, however, that it was the debtor's own fault, that the proper period was not inserted in the bond, as it was his duty to tender the bond; and further, that as he was bound by the terms of the instrument to attend at the next term, he was obliged at his peril, to take notice of the proper time, and the particular day mentioned in the condition may be treated as a surplusage. In answer to this, it may be remarked, in the first place, that it can not be yielded to be the debtor's duty to tender the bond. He is certainly bound to tender the sureties; but notwithstanding the words of the statute it may be incumbent on the officer to prepare the bond. If so, it was not the fault of the debtor but that of the sheriff; and the latter ought to be responsible—as, indeed, he is for discharging the debtor from custody upon an insufficient bond whether the one or the other was legally bound to prepare a proper one. But, supposing it to be the debtor's duty, the judgment will not be helped thereby. He may be arrested again on the original judgment, or the sheriff may be sued; but this judgment by default on the bond can not stand, because it is against both the debtor and his surety, and according to the bond, there was no default on which judgment could be signed. The surety was in no fault, and has a right to insist on the terms of his contract; and this is his motion as well as the debtor's. Neither can the day mentioned in the bond for the appearance be rejected, as overruled by the words "next court." In a writ the return day must be certain, and that specified would certainly control the general terms "at the next term of our court, etc.;" and this bond connected with the execution is

in the nature of process to compel an appearance to answer, and therefore seems to stand on the same reason. But if this be not so, another insuperable difficulty in the way of the plaintiffs presents itself in the fact, that the plaintiffs themselves did not appear at the next term after the date of the bond to demand the debtor, and the process and bond were not returned to the next term, but to that succeeding it. If the particular day stated in the condition can be rejected, and the bond is to be read as stipulating for an appearance simply, at the next term, that was in November, 1836, and the whole was discontinued, as the return was to May, 1837: in which case, also, the judgment by default is irregular. The court, therefore, is entirely satisfied that the judgment was irregular and unjust, and ought in some way to be dealt with so as to admit the defendants to be heard on the merits. If it were to stand as to the surety, he would be fixed without laches and against his contract; and as to the principal, he would be deprived of the benefit of the act of 1822 by its express provision, although he be an honest insolvent debtor. The creditors may undoubtedly have remedy for their debt; but they ought not to get it in this short-hand way, against the law, the course of the court and fair practice, and to the prejudice of the legal rights of the other parties.

Of the power of the court to vacate an irregular office judgment, no doubt is entertained by us. It has been exercised in innumerable instances, for the purposes of justice, and to allow to both parties the opportunity of being heard. It proceeds on the ground that a judgment has been signed on the record, which was not in fact the judgment of the court, which the court ought not to have rendered, and which the plaintiff or his attorney knew the court would not at all give or allow, or would not then give or allow. It supposes a judgment, as respects the period and circumstances of rendering it, and its conclusiveness on rights which have not been investigated, not only without the authority of the judge, but against and in spite of his opinion and will, as declared or evinced in the settled practice, or, as it is called, the course of the court. If judgment by default, interlocutory or final, be signed according to the course of the court, then it is the judge's judgment; because it is entered according to his directions. And, although the former is always under the control of the court, yet from its nature the court ought not and will not interfere with the latter, that is, a final judgment after the term at which it is taken. If the judgment be taken against the course of the court, then it is in no sense the judge's judg-

ment; and it belongs to him as a right of his own, to make the record speak the truth, by vacating the entry of what purports to be his act, but was not his act in reality. It is incident also to his duty of administering justice between parties. It is true, that until set aside, it must in general be regarded as a subsisting and regular judgment, as to all the world. But any person affected in interest may claim, *ex debito justitiæ*, the exercise of this power of the court to vacate a judgment entered without an actual or implied adjudication; and this motion was made in due time, being at the first court after the judgment. The text-writers are full of instances in which irregular judgments by default have been set aside at a subsequent term: Tidd Pr. 614; Bing. on Judg. 21, 22. There have also been many accordant adjudications in this state. Among them are the cases of *Crumpler v. The Governor*, 1 Dev. 52, and *Bender v. Askeu*, 3 Id. 150 [22 Am. Dec. 714]. For the reasons given this seems to be a necessary function of every court. Much more is it incident, from extreme necessity, to the court of the highest jurisdiction, to which no writ of error lies as is the case with our superior courts of law.

The court concludes, that the decision of his honor is erroneous—inasmuch as the superior court of Cumberland had power to vacate the judgment in question, if irregular; and as this court deems the same irregular, and it was also so declared by his honor on the motion before him, in the opinion of this court, the superior court ought to have allowed the motion and set aside the judgment. Wherefore the decision of the superior court on the motion must be reversed with costs, and this judgment certified to that court, in order that the said motion may be there allowed, and the entry of the judgment against Anderson and Duckworth vacated.

By Court. Judgment reversed.

The principal case is adverted to in *State v. Melton*, Busb. L. 426, as authority for the proposition that an obligation requiring the appearance of a party at a term of court to be held on one week, is not violated by his failure to appear at a term held on a different week, though the wrong time was inserted by mistake. Cited also and approved in *Cohon v. Morris*, 1 Jones' L. 218, to the effect that a judgment against the sureties on a bond given for the appearance of a party, is irregular and void, when it appears upon the record that the defendant and his sureties had been previously discharged from all liability by the plaintiff, and a new bond accepted for the further appearance of the defendant. The rule declared in the principal case relative to the power of a court of record to set aside its judgment for irregularity, upon motion made at a term subsequent to that at which the judgment was ren-

dered, is affirmed, and the case cited as authority in *Powell v. Jopling*, 2 Id. 400; *Griffin v. Hinson*, 6 Id. 154; *Hervey v. Edmunds*, 68 N. C. 243. In *Arrowood v. Greenwood*, 5 Jones' L. 414, the action having been pending for several terms, an order was made requiring the plaintiff to give security to prosecute the suit, and upon his failure to do so at the appointed time the action was dismissed. At the following term, upon motion of the plaintiff, the cause was re-instated, it having been made to appear to the court that at the time the judgment of dismissal was entered, a sufficient bond for the prosecution of the cause was in fact on file, having been given at the time of the issuance of the original writ. The order of the lower court vacating the judgment of dismissal was reversed as having been improper and unauthorized, and allowing a proceeding to be taken advantage of on motion, which could only be revised by writ of error. The distinction is there defined between a judgment which is irregular, because presumed to be without the concurrence of the court, either actual or constructive, and one which is erroneous merely, because of facts not presented to the court, and of which it did not have cognizance. See, also, *Dobbin v. Gaster*, 4 Ired. 71, citing the principal case, and declaring the same distinction.

IRREGULAR JUDGMENT IS VALID UNTIL SET ASIDE: *Allen v. Huntington*, 16 Am. Dec. 702, in the note to which the different cases in this series upon this subject are collected. See, also, *Doe v. Rue*, 29 Id. 368, and note thereto. As to distinction between irregular judgment and one which is erroneous, see *Den v. Albertson*, 22 Id. 719; see, also, note to *Skinner v. Moore*, 30 Id. 169.

STATE v. JOLLY.

[3 DEVEREUX AND BATTLE'S LAW, 110.]

JUDGMENT AGAINST TWO DEFENDANTS jointly tried upon an indictment in a criminal prosecution, which imposes a fine on each, but is silent upon the matter of costs, is a several judgment against each for the entire costs, and either party may appeal without the other.

HUSBAND IS INCOMPETENT TO BE A WITNESS AGAINST HIS WIFE in a criminal prosecution for adultery, as to matters transpiring during the existence of the marriage relation between them, although, before the trial in which he is called to testify, the parties had been divorced.

INCOMPETENCY OF HUSBAND TO TESTIFY AGAINST THE WIFE, is not restricted to testimony the sole object of which is to convict her of crime, but the prohibition extends to and includes whatever may have a direct tendency to criminate and degrade.

HUSBAND OF A WOMAN IS NOT COMPETENT as a witness against a person jointly indicted with her for adultery, as to acts committed during the subsistence of the marriage relation.

JOINT INDICTMENT FOR FORNICATION AND ADULTERY, which charges an unlawful bedding and cohabiting together, describes the offense sufficiently, and the charge is sustained by showing a habitual surrender of the person of one for the gratification of the other.

INDICTMENT against Curren Jolly and Elizabeth Whitley for fornication and adultery. The indictment charged that the de-

defendants did unlawfully bed and cohabit together as man and wife, without being joined together in the holy bonds of matrimony. On the trial, Henry C. Whitley, former husband of the defendant, Elizabeth, was offered as a witness on behalf of the prosecution, and, in opposition to defendant's objection, was permitted to testify to facts showing a criminal intimacy to have existed between the defendants, while the witness and the defendant, Elizabeth, were husband and wife. Previous to the trial, however, the witness and his wife, the defendant, had been divorced. The defendants requested the court to charge the jury that they ought not to convict unless the evidence satisfied them that the defendant, Jolly, or the defendant, Elizabeth, had taken the other into his or her house, and that they had lived together in adultery. The court refused so to charge, but instructed the jury that it was not necessary for the parties to live together in the same house. Verdict of guilty. Defendants moved for a new trial and also in arrest of judgment. Motion overruled. The judgment of the court imposed a fine on each of the defendants, but stated nothing as to costs. Defendant, Jolly, appealed.

Iredell, for the defendant.

Attorney-general, for the state.

GASTON, J. Upon the trial of this indictment the former husband of the female defendant, who had been divorced from her by a regular judicial sentence, was introduced as a witness by the state, to prove the adulterous intercourse between her and the appellant previously to the divorce. The counsel for the defendants objected to the witness as incompetent for this purpose, but the court being of opinion that the case did not come within the rule excluding testimony of confidential communications, and of such facts as are known by reason of the confidence between man and wife, admitted the testimony, whereupon the defendants were both convicted, and one of them, the male defendant, Jolly, appealed to this court.

It has been objected on the part of the state, that this appeal is irregular, for that although the sentence was several as to the fines imposed, it was joint as to the costs. We do not so understand it. The sentence is in law several in all respects; where the costs can be discriminated, each is liable for his or her part of them, and where they can not be, each is liable for the whole. The judgment against each is to pay the fine and costs of prosecution.

The objection made to the witness would have been insuperable, if, at the time of the trial, he had remained the husband of the female defendant. It is a rule, subject to very few exceptions arising from necessity, that a wife can not be a witness for or against her husband, nor a husband for or against his wife, nor either for or against any person who is a party on the record, and in interest with such husband or wife. This rule is founded principally upon the identity of interest which the law creates between the married pair, and so far as it is based upon this principle, the rule ceases with the dissolution of the relation which made the two one flesh. But it is also founded on public policy, which seeks to render the relation not only one of intimate union, but of entire confidence, and this policy makes it necessary that the disability to testify against each other should in part (at least) remain after the connection shall have been altogether severed. It would outrage propriety if the law were to require or permit communications made under the seal of marriage confidence to be published, to the injury or disgrace of the trusting party, after the marriage was dissolved. The law had invited confidence, and it should not permit this confidence to be violated or betrayed. But it is not enough to throw protection over communications made in the spirit of confidence. The intimacy of the marriage union enables each to be a daily and almost constant witness of the conduct of the other; and thus in fact a confidence, reaching much farther than that of verbal communications, is forced upon each of the parties. What one may even desire to conceal from all human eyes and ears is thus almost unavoidably brought within the observation of the other. The confidence which the law thus extorts as well as that which it encourages, ought to be kept sacred, and therefore the husband and wife are not in general admissible to testify against each other as to any matters which occurred during the relation.

But it is argued by the attorney-general that the criminal conduct testified to in this case was itself an outrageous violation of the marriage vow—a matter in respect to which confidence was not yielded by the wife, nor could have been asked by the husband—a wrong to him of which he had a right to complain, of which he had complained, and for which he had obtained redress by a final separation from his false partner, and it is therefore insisted that testimony as to conduct of this kind, occurring during the continuance of the marriage relation, ought not to fall within the general rule above stated.

No decisions have been cited either for the state or the prisoner bearing directly upon this point. Indeed, most of the adjudications referred to in the argument, in relation to the general rule itself, are *nisi prius* decisions, very briefly reported and not entirely reconcilable to each other: *Monroe v. Twisleton*, Peak. Ev., app. 91; *Beveridge v. Minton*, 1 Car. & P. 364; 11 Eng. Com. L. 421; and *Doker v. Hasler*, Ry. & M. 198; 21 Eng. Com. L. 416. In this dearth of authority we must decide the question by a proper application of the principle of the rule.

We are not satisfied that the exception contended for is established by the reasoning urged in its support. The rule we deem a valuable one, and we view with apprehension any exception having a tendency, more or less direct, to promote cunning, or to generate distrust, where the best interests of society require that perfect frankness and confidence ought to prevail. If one exception be sanctioned because from the character of the criminal act imputed, the dissent of the witness from its commission must be presumed, others may follow where the like presumption will be entertained, although not perhaps with equal confidence—and there will be danger of our having no rule capable of general and steady application. Besides, in the infinite variety of motives which operate on wayward and depraved beings, it may happen even in adultery that actual confidence is reposed in the party supposed to be most injured. The judicial records furnish instances in which the husband was the confident of his wife's licentious amours: *Cibber v. Sloper—Smith v. Allison*—Bull. N. P. 27. But moreover the rule is not founded exclusively upon an actual voluntary confidence reposed by one of the married pair in the other, but also upon the unavoidable confidence which the intimacy of the marriage state necessarily produces. It is safest we think to hold that whatever is known by reason of that intimacy should be regarded as knowledge confidentially acquired, and that neither should be allowed to divulge it to the danger or disgrace of the other. In holding this doctrine we do not in the slightest degree impugn our decision in *Hester v. Hester*, 4 Dev. 228. The disclosure there authorized was of a matter which the former husband of the witness could not have wished to conceal, but must have desired to make known, and to make known through her if he found no other means of doing so.

It has been argued, however, that supposing the objection to the witness to be good, it was an objection personal to the wife, and as she has submitted to the judgment, the appellant has no

right to complain of the objection having been overruled. But we hold otherwise. The objection was made on the trial, and, if well founded, the testimony offered should have been excluded. *Non constat* that there was any other testimony to establish the charge, and if not, the appellant has been unlawfully convicted. Besides we are of opinion that if the appellant had been solely on trial, the testimony of the husband should not have been received. The crime charged is one in which the guilt of both was necessary to be shown, and we understand the prohibition of the husband to testify against his wife, and of the wife to testify against her husband, to apply not only when the testimony is offered to convict, but when its direct tendency is to criminate and degrade: *King v. Inhabitants of All Saints Worcester*, 6 Man. & Sel. 194.

Our determination upon this point renders it unnecessary to examine the other question which was raised upon the judge's charge, and which is also presented by the motion in arrest of judgment. But as we have no difficulties upon it, and to prevent future controversy, we deem it proper to say that as we understand the law, the offense is sufficiently described by charging an unlawful "bedding and cohabiting together," and this charge is sufficiently made out by showing such an habitual surrender of the person of the one to the gratification of the other as usually takes place in the marriage state.

For the error in receiving the testimony of the former husband of the female defendant, the judgment is to be reversed and *venire de novo* awarded.

By COURT. Judgment reversed.

THE WIFE IS A COMPETENT WITNESS AGAINST THE HUSBAND on his trial for a personal outrage committed against her: *State v. Boyd*, 27 Am. Dec. 376, is the note to which the question of the admissibility of the testimony of married persons in relation to matters tending to criminate either, is treated at length; also *State v. Davis*, 5 Id. 529. Upon the question of the admissibility of evidence generally, on the trial of an indictment for adultery, see *Commonwealth v. Merriam*, 25 Id. 420. The principal case is cited in *Gardner v. Kentis*, 8 Jones' L. 376, as establishing the rule that a wife is not a competent witness for or against her husband, and her declarations made shortly after the birth of a child, that it had been born alive, are therefore inadmissible to prove the husband's title to an estate by the curtesy.

STATE v. ROBINSON ET AL.

[3 DEVEREUX AND BATTLE'S LAW, 130.]

MALICIOUS MISCHIEF MUST PROCEED FROM MALICE toward the owner of property injured, and evidence that property was injured or destroyed through mere wantonness, or in sport, and not from a feeling of resentment towards its owner or possessor, is not sufficient to convict the defendant upon an indictment charging this offense.

INDICTMENT for malicious mischief. The court instructed the jury that if the mischief complained of was accomplished through mere sport or wantonness, the defendants were guilty, although they had no malice against the owners of the property. Verdict of guilty. Defendants appealed.

Caldwell, for the defendants.

The Attorney-general, for the state.

GASTON, J. The distinction between those injuries which are regarded simply as trespasses on the rights of individuals, and those which amount to a violation also of the duties due to the community, ought to be accurately drawn and carefully observed. We fear that this has not been done in this state with respect to the wrongs known under the general name of "malicious mischief," and apprehend that this confusion has been the result of treating as common law offenses, acts which owe their existence, as crimes, wholly to positive statutes. For reasons which have been assigned in the case of *the State v. Scott* (2 Dev. & B. 35), it is too late now to question whether an indictment for malicious mischief may not be sustained as for a misdemeanor at common law, but there is difficulty in laying down clearly the necessary constituents of that offense. It is obvious if "malicious" be understood in its legal sense of intending wrong, and "mischief" mean any harm done to another's property, that almost every trespasser on property may be made the subject of criminal prosecution. The description of malicious mischief usually given by the writers on criminal law, that is to say, "such damage as is done to private property, not *animo furandi*, or with an intent of gaining by another's loss, but either out of spirit of wanton cruelty or black and diabolical revenge," may answer as a general indication of those common law trespasses, which, by a multitude of statutes, have been raised into crimes, but it is too destitute of precision to constitute a legal definition. What spirit of severity shall be deemed a spirit of cruelty—what degree of cruelty mounts up to wanton cruelty—

and what intensity of revenge is required to render it black and diabolical—may be considerations in the exercise of legislative discretion, but can not be fit subjects of judicial ascertainment, nor furnish of themselves rules of public justice susceptible of steady and uniform application. We can discover no other mode in which we shall at the same time pay becoming deference to preceeding adjudications, and secure to the public that certainty which is indispensable in the administration of criminal justice, than to hold such invasions of private property to be indictable as malicious mischief, which are unquestionably within the limits of those adjudications, and to treat all others as private or civil wrongs, until the legislature shall think proper to impress upon them a different character. Governed by these views we extract from the adjudged cases as a rule of decision, that malicious mischief to be indictable, consists in the willful destruction of some article of personal property, from actual ill-will or resentment towards its owner or possessor: *State v. Landreth*, 2 Law Rep. 446; *State v. Simpson*, 2 Hawks, 460.

It is the opinion of this court that there was error in the charge of the judge below, and that the judgment rendered against the defendants be reversed and a new trial ordered.

By Court. Judgment reversed.

MALICIOUS MISCHIEF AT COMMON LAW is defined as being any malicious or mischievous injury, either to the rights of another or to those of the public in general: 2 Whart. Crim. L., 8th ed., sec. 1067. Though the definition of the learned commentator given above departs in some respects from that expressed in the opinion of the court in *State v. Robinson*, it is, perhaps, a more accurate and precise definition of malicious mischief, as that offense was understood and recognized at common law, in the majority of instances in which the question has been made a subject of judicial investigation. The definition of this term, as expressed by the court in the principal case, though it has received the approval of eminent authority, and in one instance has been adopted as affording a clear and precise explanation of the character of malicious mischief as it existed at common law, is, perhaps, not entirely accurate in limiting the offense to such damage as is done to personal property and excluding such as is committed upon real property, and, by affirming that the consequence of the wrong must be a destruction of the property, precluding such injury as is only partial in its character, and does not result in an entire and total demolition of it. It will be seen, as the result of the definition adopted above, that many acts, which involve no greater degree of wrong than such as attaches to a mere civil trespass, and for which there is a civil remedy provided and allowed by law, may, nevertheless, because magnified into a public wrong, or misdemeanor, be criminally indicted and punished. Anciently, at common law, though malicious injury to property is conceded to have been recognized and considered as a public offense and misdemeanor, for which an indictment might be sustained and punishment inflicted, yet the statutes passed in rela-

tion to this offense are so ancient and so numerous, so specific in their provisions, and so severe in the penalties that they inflicted, that the common law has been lost sight of, and no decisions directly to the point are to be found among the English reports, from which it may with certainty be concluded, that malicious mischief, as a public offense and misdemeanor, indeed existed anterior to any legislative enactment.

A multitude of penal enactments, the special purpose of which was to provide against malicious mischief, were, from the time of Henry VIII. until within the present century, made the subject of legislative action in England. In most if not all of these statutes, the particular classes or articles of property to which the protection was extended, were enumerated in detail in the law, and each object of investment or ownership, as it was brought into notice, was, by a special statute, protected from injury or aggression by severe penalties. To such an extent had these laws multiplied that Blackstone, in speaking of malicious mischief, was enabled to say, "though only a trespass at common law, it is now, by a multitude of statutes, made penal in the highest degree:" 4 Bl. Com. 244. But malicious mischief, as a common law offense, has been invested with a far more extended meaning and liberal interpretation in this country than has been attached to it in England. The legality, under the common law practice, of a criminal proceeding by indictment, for the punishment of an act which in its consequences amounted to nothing more than a private wrong producing a civil injury, which occasioned no great public harm or inconvenience, and for which, at the instance of the person aggrieved, an action at law for redress and satisfaction, might be maintained against the aggressor, was gravely questioned by respectable authority.

The supreme court of the state of Vermont held that offenses against private property, of that species known as malicious mischief, had no existence at common law, and refused to sustain an indictment for maliciously killing an animal, the property of another, upon the ground that the act constituted a mere private injury, of no public significance or importance, and for which a civil action of trespass would lie against the offender. The distinction between those trespasses for which there is a private remedy only, and those for which there may be a public prosecution, did not appear to the court to be laid down in the books with much accuracy or precision. But the court seemed satisfied that though every trespass which is a disturbance of the peace is indictable, yet a mere trespass which is the subject of a civil action is not so, upon any hypothesis drawn from the common law; and that there was nowhere in the English books any precedent of a conviction for killing or wounding an animal, nor any intimation that such an act was an indictable one: *State v. Wheeler*, 3 Vt. 344. And in New Jersey, also, it was decided that maiming or wounding an animal without killing it, was not an indictable offense at common law. And though it was conceded in that case that the willful destruction of another's property was a crime of greater atrociousness than theft, inasmuch as it not only despoiled the owner of his possessions, but deprived the public of whatever advantage it derived from the existence of the property, and the perpetrator was incited only by a vicious and malignant motive, without even the extenuating feature of having yielded to temptation to supply his wants, yet it was denied that these acts, criminal as they might be, were ever punishable by the common law of England: *State v. Beekman*, 3 Dutch. 124; *State v. Burroughs*, 2 Halst. 426. Also in Maine: See *Brown's case*, 3 Greenl. 177.

But the prevailing current of opinion declared itself in opposition to this

reasoning and in favor of recognizing in the mischievous injury of property under circumstances indicating an evil and malicious design, a public wrong of an aggravated character, for the commission of which the offender might be amenable to indictment, trial, and punishment in like manner as for any other offense at common law. Various acts, which, uniting to the usual elements of an ordinary civil trespass, a malicious, vengeful, and mischievous intent, became aggravated by that means to the degree of an offense against public peace and dignity, were held to be the proper subjects of criminal penalties, and indictments for the commission of such offenses were sustained upon the authority of the common law. Some diversity of opinion has, however, been manifested, even in those states in which malicious mischief as a common law offense has been recognized and received, in determining collaterally, the particular character of the mischief required to complete the offense, the kind of property upon which it could be committed, and the character of the intent or motive which incited the offender to the commission of the act. And a review of some of the leading authorities will be necessary, as well to indicate that the preponderance of authority in this country is in favor of the existence of this offense as a misdemeanor at common law, as to throw light upon the exposition which has been given to it by the courts.

In *Loomis v. Edgerton*, 19 Wend. 419, the question presented was, whether a willful and malicious destruction of a boat was, at common law, an offense for which a criminal prosecution could be maintained, and the offender punished by the infliction of the penalty prescribed for offenses of the grade of misdemeanor. After a full consideration of the authorities, Cowen, J., who delivered the opinion, remarks that if the wanton, willful, and malicious destruction of property is not an indictable offense, it would form a lamentable exception to the general wisdom of the common law, and declares the balance of authority to be in favor of the rule that malicious mischief done to any kind of property is a misdemeanor, and the person committing the injury may be prosecuted criminally. In *People v. Smith*, 5 Cow. 258, and upon the authority of which the case previously cited was decided, an act of malicious mischief for killing a cow is distinguished from an ordinary trespass, in being not only a violation of private right without color or pretense, but also entirely devoid of the hope of reward and anticipation of gain, and, finally, as forming an evil example of the most pernicious tendency, an outrage to the feelings and principles of humanity, and directly conducive to a breach of the peace. The offense stated in the indictment is declared to be a proper subject of criminal prosecution. The case of *The People v. Moody*, in 5 Park. Crim. 568, is a recent and well-considered decision upon this subject. This was an indictment for willfully and maliciously mutilating and injuring a set of harness by cutting with some sharp instrument. Upon a motion to quash the indictment because the facts stated did not constitute a public offense, the question was a third time brought before the courts of the state of New York. The opinion of the court is searching and exhaustive. It is remarked as a circumstance scarcely credible that from the fourth year of the reign of William I. to the twenty-second year of Henry VIII., a period of nearly five centuries, during all of which time the common law flourished in maturity and vigor, there was no instance of a criminal punishment of the crime of malicious mischief. The explanation of this circumstance is reasonably assumed to be that the antiquity and severity of the numerous statutes passed relative to malicious mischief, led to their being regarded and resorted to instead of the common law, to increase the penalties of which was the only object of the passage of such laws. The wanton and malicious destruction of personal

property, the opinion proceeds to decide, is a misdemeanor at common law, and as such is indictable and punishable criminally.

A strong case in support of the principle here contended for is that of *State v. Latham*, 13 Ired. 33, which was tried upon an indictment charging malicious mischief in killing a dog, and the defendant convicted. The indictment was pronounced to be good by the court on appeal, so far as the question of the criminal character of the act within the principles of the common law was concerned, although a dog was admitted to have at common law no recognized value as property. The authority of this case, as establishing the rule in North Carolina, was afterwards recognized in *State v. Manuel*, 72 N. C. 201, though the restriction was there affixed, that the act of injury must amount to a killing, and merely wounding an animal was not an indictable offense at common law. Without quoting to greater length from the decisions establishing the doctrine, that malicious mischief has been recognized and declared to be an indictable offense under the common law, it will no doubt be sufficient to state, that such is unquestionably the rule which has received the approval of the most respected and highest authority of this country. It may therefore be affirmed, that the wanton, willful, and malicious injury or destruction of property belonging to another, was at common law a public offense or misdemeanor, and subject to criminal indictment and punishment as such: *Commonwealth v. Leach*, 1 Mass. 59; *Commonwealth v. Wing*, 9 Pick. 1; *Respublica v. Teischer*, 1 Dall. 335; *Henderson v. Commonwealth*, 8 Gratt. 708; *State v. Wilson*, 3 Mo. 125; *State v. Morris*, Id. 127; *State v. Batchelder*, 5 N. H. 549; *Commonwealth v. Eckert*, 2 P. A. Bro. 249; *State v. Council*, 1 Overt. 305; *State v. Hamilton*, 1 Houst. C. C. (Del.) 281. The protection of the common law extended to and included real as well as personal property, and for a malicious injury to the former, an indictment may be sustained: *State v. Wilson*, 3 Mo. 125; *State v. Morris*, Id. 127; *State v. Batchelder*, 5 N. H. 549; *Commonwealth v. Eckert*, 2 P. A. Bro. 249; *Phillips v. State*, 19 Tex. 168; *Loomis v. Edgerton*, 19 Wend. 419. It must, however, be admitted, that the inclination of recent decisions, so far as the common law is concerned, is to restrict the injured party to his civil remedies, except in those cases where the offense is accompanied by excessive wantonness and cruelty; or, where it is committed with stealth and secrecy, in the nighttime; or, where it is productive of a breach of the peace: 2 Whart. Crim. L. 1068.

MALICIOUS MISCHIEF UNDER STATUTORY REGULATIONS has been extended by enumeration to a wide variety of objects. The act of mischief required by statute, will, in most instances, be determined by the language of the statute itself, and for this reason the decisions, except where there exists some analogy in the provisions of different statutes, have but little more than a local significance. A review of the authorities will, however, serve to indicate the general character of this offense in its various statutory forms under the construction given to them by judicial interpretation. Under a statute prescribing a punishment for killing the beast of another, an indictment which charges, in terms, that the defendant killed a cow, without the addition of the word beast, is sufficient: *Taylor v. State*, 6 Humph. 285; *State v. Abbott*, 20 Vt. 537; *United States v. Mattock*, 2 Saw. 148; *Reg. v. Tiney*, 1 Car. & K. 74; a statute making the malicious burning of a stack of wheat or straw a felony, will not sustain a conviction upon an indictment under it, if the wheat or straw burned was at the time threshed and cleansed, and stored in a barn or building: *Commonwealth v. Erskine*, 8 Gratt. 624; shock of wheat is not a stack: *Denbow v. State*, 18 Ohio, 11; but flax-seed is grain within the meaning of such an act: *Reg. v. Spencer*, 7 Cox C. C. 189; growing wheat is

not included in a statute making the malicious destruction of a barrack, shack, or crib of wheat, a criminal offense: *Parris v. People*, 76 Ill. 274; nor will the offense be complete in such a case if the barrack alone be destroyed, unless it contain wheat at the time: *Chapman v. Commonwealth*, 5 Whart. 427; a buffalo is not included within the description of cattle: *State v. Crenshaw*, 22 Mo. 457; a hog is comprehended by the use of the words "domestic beast:" *State v. Enslow*, 10 Iowa, 115; statute prohibiting malicious injuries to cattle contemplates also a horse under the general description employed: *State v. Hambleton*, 22 Mo. 452; *State v. Clifton*, 24 Id. 376; cutting off the mane and tail of a horse is a malicious injury within the purport of an act inflicting a penalty for malicious injuries to animals: *Oviatt v. State*, 19 Ohio St. 573.

Under a statute punishing the willful shooting of a hog, an indictment may be maintained for shooting a sow: *Shubrick v. State*, 2 S. C. 21. Proof of the killing of a gelding will not support a conviction on a charge of having willfully killed a horse: *Ghalston v. State*, 33 Tex. 342. A conviction may be had for killing a dog under a statute declaring malicious injuries to any property punishable: *State v. Sumner*, 2 Ind. 377; *State v. McDuffie*, 34 N. H. 523. To the contrary, however, are *Commonwealth v. Maclin*, 3 Leigh, 809; *United States v. Gideon*, 1 Minn. 292; *Davis v. Commonwealth*, 17 Gratt. 617; *State v. Marshall*, 13 Tex. 55. The term "woods" in a statute includes an old field, abandoned and overgrown with brush, sedge, and grass, so as to allow an indictment to be maintained for destroying it by fire: *Hall v. Cranford*, 5 Jones (N. C.), 3. An act providing that injury or destruction to trees already cut, or any other timber or property, shall be indictable, does not restrict the offense to trees or timber exclusively, but the words "other timber or property" include domestic animals, and an indictment may be sustained under it for malicious injury to a hog: *Commonwealth v. Percival*, 4 Leigh, 686. A statute providing against the offense of altering the brand of cattle, is violated when a new brand is impressed upon an animal already branded: *Sinney v. State*, 6 Tex. 1; *State v. Nichols*, 12 Rich. 672. Wherever, as is generally the case with statutes concerning malicious mischief, the instances coming within its provisions are enumerated at length within the act itself, the general rule of construction will no doubt apply, that its operation can not be extended beyond the scope of the express words employed. But such of these statutes as are not mere codifications of the common law, define the crime in general language, and leave it to the common law to determine what that language imports, and the cases cited above will show to some extent how that relation has been interpreted. The many English statutes that have been enacted relative to malicious mischief, can not upon very clear principles, confidently be said to be common law in this country: 2 Bish. Crim. L., 6th ed., sec. 996; *State v. Campbell*, T. U. P. Charl. 166.

MALICE AGAINST THE OWNER OF PROPERTY is an essential ingredient of the crime of malicious mischief, and must be alleged and proved to sustain a conviction. That the malice called for in a charge of malicious mischief, is malice against the owner or possessor of property, and not toward the property itself or toward any other person, is no doubt the established rule relative to this crime, as it existed at common law at least, and as it has been expounded and determined by a long and uniform line of judicial decisions: *State v. Pierce*, 7 Ala. 728; *Northcot v. State*, 43 Id. 330; *Hobson v. State*, 44 Id. 330; *Dawson v. State*, 52 Ind. 478; *State v. Enslow*, 10 Iowa, 115; *Wright v. State*, 30 Ga. 325; *Duncan v. State*, 49 Miss. 331; *State v. Newby*, 64 N. C. 23; *State v. Jackson*, 12 Ired. 329; *State v. Latham*, 13 Id. 33; *State v. Hill*, 79 N. C.

656; *State v. Wilcox*, 24 Am. Dec. 569; *Geforth v. State*, 8 Humph. 37; *Newton v. State*, 3 Sup. Ct. App. 245. These decisions are abundantly sufficient to indicate that this offense must, to satisfy the requirements of the law, proceed from malice toward the owner or possessor of the property destroyed. This rule would seem to, and no doubt does, exclude from the intent required in order to establish this offense, not only malice of a general character, or such as is usually presumed to accompany the commission of an unlawful act, but also express malice against a particular person other than the owner or possessor.

This restriction was emphatically declared in *Northcot v. State*, 43 Ala. 830. That case arose upon an indictment for malicious injury to an animal. Upon behalf of the prosecution, evidence was introduced to show the existence of a feeling of malice and ill-will, upon the part of the defendant, against a son of the owner of the animal. The court charged the jury in relation to this evidence, that if it appeared that the defendant entertained a sentiment of ill-will or of hatred toward the son, and that such feeling was the moving cause of the injury, it was sufficient to sustain the charge of malice in the indictment, because the son had a reversionary interest in the property destroyed. This portion of the charge, and the admission of the evidence upon which it was based, were assigned as error on appeal, and the judgment in the case was reversed by the appellate court, not only because the evidence complained of should have been excluded, but for the reason, as the opinion affirmed, that the charge was wrong on principle; that malice was the gravamen of the offense charged, and it must be malice to the owner. If the injury was inflicted without malice toward the owner, it was a mere trespass and not malicious mischief. But it is not absolutely indispensable that, in order to prove the existence of such malice as this rule requires, it should be shown that the defendant ever said or did anything indicative of his express malice against the owner. Malice may be inferred if the injury is unlawful, from the instrument used, or the wantonness of the deed, and from any attendant circumstances which would justify the inference of malice in other crimes where malice is an essential constituent: *Hill v. State*, 43 Ala. 335; *Hobson v. State*, 44 Id. 390; *State v. Enslow*, 10 Iowa, 116.

While the majority of the decisions but emphasize the general principle, that malice toward the owner or possessor of the property is a necessary element of the crime, it is questionable whether they are to be understood as deciding that such malice must, as an incentive to the crime, be established by direct and positive evidence. Nowhere, except in North Carolina, has the rule been in express terms extended so far as to require proof of actual malice. In that state, in the case of *State v. Newby*, 64 N. C. 23, upon an appeal from a judgment of acquittal under an indictment for maliciously killing an animal, upon a special verdict finding all the essential facts charged except the fact of malice toward the owner of the animal, the question was presented, whether the malice required could not be presumed by inference from the act of unlawful killing, as in cases of homicide without legal justification. The judgment of the appellate court was adverse to the point maintained by the state, and it was expressly decided that malice toward the owner must be found: the distinction between the case at bar and the example instanced being that homicide was a crime *per se*, and excuse or justification must come from the defense, or appear otherwise on the trial, while the killing of an animal was not so. The verdict being special, and having failed to find on the question of malice toward the owner, was therefore held equivalent to an acquittal. It is to be remarked, that in this case the decision of the court was based

upon the failure of the verdict to find a fact which was an indispensable element of the offense, and is not therefore to be taken to indicate what would have been the judgment of the court if the essential fact had been found, and the question presented upon the sufficiency of the evidence to justify the finding, there being no evidence other than the act of killing and the circumstances under which it was done. It is entirely safe to conclude that in this offense malice may be inferred, as in any other case, from all the facts presented.

The reason of the rule requiring malice toward the owner of the property, and disregarding what may be called general malice, or malevolence, has been criticised by an eminent authority upon criminal law: Bish. Stat. Cr., sec. 436. And this seems consistent with sound principle. The doctrine was applied in the construction of the early English statutes, and not until, through the interference of parliament, an act was passed declaring that it should be immaterial whether the offense was conceived through malice against the owner or not, was the rule relinquished. The principle, as a rule of common law relative to the crime of malicious mischief, had its origin, no doubt, in the reluctance with which the courts of law were induced to recognize the existence of such an offense at all, preferring to regard an act of injury to the property of another, which was devoid of the element of express malice, as a civil trespass merely, and not a public misdemeanor. And therefore it was required, that in order to complete the act as a criminal offense it should be accompanied by a vindictive and malevolent motive, actuated by malice toward the owner of the property, and intended to annoy, harass, and injure him. But malice is a generic term. It may declare itself in an avowed manner toward the object of its resentment, or it may be discovered only in the secret and unexpressed incentives of a depraved, abandoned, and malignant heart. This is the language of the law in regard to criminal offenses generally, and the reason of adopting a distinction in the particular instance of malicious mischief does not seem consistent with entire exactitude and uniformity. Malice in abstract, as signifying the evil design that invests an otherwise innocent act with a criminal character, is sufficient in other cases to supply the intent, from which responsibility for crime within the meaning of the law proceeds; and it would properly seem to fall within, as well as beneficially execute, those considerations upon which the prohibitions contained in statutes relative to malicious mischief are founded.

It is difficult to discern any distinction between an act of injury committed through wantonness, and one committed through maliciousness; between a wrong of which revenge is the motive, and one caused by an abandoned and depraved instinct, indicating the existence of that vicious spirit, which is sufficient to establish intent in other cases, so as to bring the act within the reason of those penalties imposed by criminal laws. Mr. Bishop, in the section before stated, concludes for similar reasons, that upon principle, general malice, or malice toward a particular person other than the owner, ought to suffice. In *Stone v. State*, 3 Heisk. 457, the question arose whether the offense was established where the malice which induced the act was malice toward the bailee of the animal injured, and not toward the general owner. The court stated the law to be well settled, that malice toward the owner was necessary to constitute malicious mischief; that it was necessary to allege that the property was maliciously injured, and also to state who the owner of the property was. "But it is not necessary," the court continued, "that it should be charged that the killing was with malice toward the owner. The owner should be named by way of identification, and because upon conviction the

defendant would be liable to judgment for the value of the horse. The charge of the court was that proof of malice toward the special owner was sufficient, although the indictment named the general owner. As it was not necessary to charge in the indictment, that the killing was with malice toward the general owner, it is sufficient to prove that it was done with malice toward the special owner." In Ohio, when this question was presented for judicial determination, the court, believing that the decisions in some of the states had carried the rule too far, refused to follow them. After a full consideration of the English cases, the court concluded that upon principle, as well as authority, the law was satisfied if the crime proceeded from general malevolence, cruelty, or depravity. It was accordingly held, that in order to prove the offense of unlawfully, willfully, and maliciously injuring a horse, where it was made to appear that the act charged was cruel and seriously injurious, and was done willfully and deliberately for the purpose of gain, it is not necessary to show, that the offense was committed from motives of personal malice or ill-will toward the owner: *Brown v. State*, 26 Ohio St. 176. So also in Georgia it is held that under the statute there in force, to constitute the crime of malicious mischief, it is not necessary to prove actual ill-will or resentment toward the owner or possessor of property; but if the act be done under circumstances which bespeak a mind prompt and disposed to the commission of mischief, or wantonly and recklessly, it is sufficient: *Moely v. State*, 28 Ga. 190.

The English cases upon this subject are collected and commented upon in 2 East P. C. 1072, *et seq.* As has been stated, the prevailing doctrine upon this question was, that the malice must have been directed against the owner, and not against the property itself, in order to bring the offender within the law. In all the cases there cited of malicious injury to animals, there was reasonable evidence appearing upon the face of the transaction itself, to justify the conclusion that the malice was against the particular animal and not any personal malice against the owner. And it does not seem at any time to have been required, that there should have been express evidence of malice previously existing in the mind of the accused against the owner, in order to bring the case within the law: but the act, if done willfully, and under circumstances indicating a brutal and malignant instinct, it seems a question solely for the jury in consideration of all the facts presented, to attribute the real motive. In the case of Rogers, referred to by Mr. East, although the question was not directly presented, it was the unanimous opinion of all the judges, that it was not necessary in cases of this character, that there should be evidence directly showing the existence of a previous feeling of malice and ill-will toward the owner. It will be seen from the cases cited, that while the doctrines announced upon this question, in different jurisdictions, are not entirely uniform in regard to the extent and effect to be accorded to this rule, yet they are in harmony, generally, upon the common principle, that malice is an essential element of the crime, and that the malice required must be toward the owner or possessor of the property injured. It may therefore be concluded as the result of this review, that while malice is essential and must be shown to exist against some one having an interest in the property injured, yet it is sufficient if the act be charged generally as having been maliciously and mischievously committed, and the fact of the existence of the malice demanded by the law, may be inferred from all the circumstances attending the commission of the act.

EVIDENCE OF JUSTIFICATION UPON A CHARGE OF MALICIOUS MISCHIEF is, as a natural result of the rule requiring the existence of malice, a sufficient de-

fense upon the trial, as tending to disprove the criminal intent. It is proper, therefore, for the accused to show, that at the time of the commission of the act, he stood in fear and apprehension of impending injury to his own property, and that the act charged was reasonably necessary to prevent or avert such injury. Upon the charge of maliciously killing an animal, the defendant may introduce evidence showing that the killing was done to protect his crop, and it is error to refuse to allow him to prove that the animal had a habitual proclivity for the commission of mischief, and was with difficulty restrained from it: *Wright v. State*, 30 Ga. 325; *State v. Waters*, 6 Jones' L. 276. So, upon an indictment for malicious trespass, it is a good defense that the act was done under legal advice, and in consequence of a claim of authority and right: *Loosen v. State*, 62 Ind. 437; *Dawson v. State*, 52 Id. 478; *Palmer v. State*, 45 Id. 388; *State v. Flynn*, 28 Iowa, 26; *Goforth v. State*, 8 Humph. 37; *Sattler v. People*, 59 Ill. 68. It is not material upon the trial of a charge for malicious destruction of property of which the defendant had possession, but which belonged to another, whether the possession of the defendant was rightful or otherwise: *State v. Pike*, 33 Me. 361. On the trial of an indictment for maliciously killing an animal, any evidence on the part of the accused tending to show the animus and intention of the act, is competent to establish his innocence, although it embraced facts subsequent to the killing: *State v. Graham*, 46 Mo. 490. The contrary doctrine is declared in Illinois, where it has been held that a conviction may be had for wounding an animal trespassing in a field, under a statute providing for the crime of willfully or maliciously wounding animals, and it is no defense to show that at the time the animal was doing damage: *Snap v. People*, 19 Ill. 80. This decision does not necessarily vary or restrict the rule so far as the question of malice is concerned, as the statute in that state makes not only malicious, but willful injury, indictable.

INDICTMENT FOR MALICIOUS MISCHIEF usually alleges malice, describes the property, states who is the owner, and with the certainty and precision of all indictments, for whatever offense, sets out the particular acts which constituted the offense in the individual instance: Bish. Crim. Proc., sec. 839. It is not essential that the value of the property should be stated in the indictment, except in those instances in which the value of the property destroyed determines, or in some manner affects the punishment, in which case it should be set out: *Caldwell v. State*, 49 Ala. 34; *State v. Heath*, 41 Tex. 426; *Nicholson v. State*, 3 Tex. Ct. App. 31. If the property destroyed belongs to a number of persons organized into an association under a company name, but unincorporated, the indictment should state the names of the persons composing it individually: *Stauden v. People*, 82 Ill. 432. The character and nature of the injury should be set forth with sufficient minuteness of detail as will accurately describe and sufficiently identify the transaction: *Nicholson v. State*, *supra*; Bish. Crim. Proc. 841. As to the allegation of malice, it seems only to be required that the offense should be alleged generally as having been maliciously committed, and this may assist in describing malice towards the owner. But such allegations in an indictment will naturally depend upon and follow the statute under which it is drawn. It was held in one case that the averment made generally that the offense was maliciously, willfully, and feloniously committed was insufficient without charging that it was done mischievously or with malice toward the owner: *State v. Jackson*, 12 Ired. 329. See on this subject Bish. Crim. Proc. 842; 2 Chit. Crim. L. 23; Whart. Crim. L., 8th ed. 1079.

INJURY OR DAMAGE IS AN ESSENTIAL ELEMENT OF MALICIOUS MISCHIEF,

and any malicious act, however wanton or dangerous, which does not result in any destruction or even injury to property, does not amount to malicious mischief: *Wait v. Green*, 5 Park. Crim. 185. At common law, it has been held an indictment for malicious mischief for injury to animals can only be maintained where the act of injury amounted to a killing, and therefore merely maiming or wounding an animal was not an offense: *State v. Manuel*, 72 N. C. 201. Cutting off the mane and tail of a horse is a malicious injury sufficient to sustain a conviction under an indictment charging that offense: *Oviatt v. State*, 19 Ohio St. 573.

TRIAL OF INDICTMENT FOR MALICIOUS MISCHIEF does not involve title to property or of right of possession, and can not be made to determine these questions: *Jenkins v. State*, 7 Tex. Ct. App. 146; a justice of the peace, therefore, having jurisdiction to try this offense, may hear and determine a charge for malicious mischief to real property, although the defendant claims an adverse title to the lands upon which the injury was inflicted: *State v. Rising*, 10 Nev. 97.

The principal case is cited in *State v. Helmes*, 5 Ired. 364, as authority for the rule that an indictment for malicious mischief may be maintained at common law; and referred to also in *State v. Jackson*, 12 Id. 329, as a precedent establishing the doctrine that the crime of malicious mischief consists in the destruction of property from malice toward the owner.

LYNCH v. ALLEN.

[4 DEVEREUX AND BATTLE'S LAW, 62.]

DESCRIPTION CONTAINED IN A DEED calling for a marked line along a river is construed to have relation to the natural object which is the more important description, and the course of the stream will control the marked line, the former being in law the true boundary.

DEED DESCRIBING A BOUNDARY AS FOLLOWING THE COURSE OF A RIVER, preserves the boundary as it was at the time of the execution of the deed, and is not changed by excessive floods causing such stream to desert its bed and producing violent and visible alterations in its course.

EJECTMENT. Plaintiff's lessor on the trial produced in evidence a deed for a tract of land, the south boundary of which was described as following the course of a river along a marked line, to a particular point upon the bank. It was proved that when the lessor of the plaintiff purchased the land in 1820, a line was run and marked on the south bank of the river, following its course, to the point indicated in the deed; that since that time the river had encroached on the north bank by freshets, and that by the accumulation of soil deposited during those freshets, the south bank of the river had extended, and the bed of the river shifted to the north. It was also proved by other witnesses that the original bed of the river existed as contended for by the plaintiff at the time of the deed to his lessor. Defendant was shown to be in possession of the land in dispute, and also showed

title to the land on the south side of the river under a deed, the north boundary of which was described as following the plaintiff's line on the south bank of the river. Defendant contended that he had a right to go to the south bank of the river wherever that might be. The court charged the jury that if they believed that the line was run and marked in 1820 as alleged, and that the locality of said line was as contended for by the plaintiff, and they further believed the defendant to be in possession of the land north of said line, the plaintiff was entitled to recover. Verdict and judgment for plaintiff's lessor. Defendant appealed.

Clingman, for the defendant.

D. F. Caldwell, for the plaintiff.

GASTON, J. The court is of opinion that there was no such error in the instruction to the jury as to warrant a reversal of this judgment. We do not indeed hold that as the deed to the lessor of the plaintiff called for a marked line, that this line, wherever established, was the boundary of that deed. We agree with the counsel for the defendant that as the deed contained a double description "along the river" and "a marked line," the natural object was the more important description, controlled the marked line, and was in law the true boundary. But it does not follow that because the river has deserted the bed in which it flowed when that deed was executed, that the boundary of the land of the lessor of the plaintiff has shifted with it. Admit that such would have been the consequence if the river had receded from its southern bank by small and almost imperceptible gradations, a point upon which no opinion is intended to be expressed or intimated, this consequence does not follow from changes by sudden and violent floods. Such is stated to have been the fact in this case. The change of the bed of the river was made by freshets, which we must understand to be excessive floods producing violent and visible changes; and the charge of the judge is not to be treated as an abstract proposition, but as a practical instruction to aid the jury in applying the law to the case before them.

By COURT. Judgment affirmed.

NATURAL OBJECTS PREVAIL OVER MARKED LINES establishing linear measurements, in determining the tract contemplated by the description of a deed: *Hurley v. Morgan*, 28 Am. Dec. 579; and note thereto in which the cases upon this subject, in this series, are collected. See also the note to *Heaton v. Hodges*, 30 Id. 734, discussing the subject at length.

LANDS BOUNDED BY A LINE FOLLOWING A BODY OF WATER extend to the margin of the water as it existed when the conveyance was made: *Bradley v. Rice*, 29 Am. Dec. 501. If the height of the water at the time of the grant was unduly increased by obstructions of an unusual character, the deed will include the land to the margin of the body of water, as it ordinarily existed, when such obstructions were removed: *Hathorne v. Stinson*, 28 Id. 167.

PARROTT v. HARTSFIELD.

[4 DEVEREUX AND BATTLE'S LAW, 110.]

PLEA OF JUSTIFICATION TO AN ACTION OF TRESPASS for killing plaintiff's dog, is sustained by proof indicating that the defendant acted under a reasonable apprehension that the killing was necessary to prevent the destruction of his own property.

EVIDENCE IN SUPPORT OF PLEA OF JUSTIFICATION to such action, need not show that plaintiff was cognizant of the mischievous disposition of the dog, or that the defendant had no other mode of protecting the property menaced.

TRESPASS *vi et armis*, for killing a dog. Pleas, the general issue and justification. The ownership and possession of the plaintiff, and the killing by defendant, were not denied. Defendant, in support of his plea of justification, proved that previous to the killing, but on the same day, the dog had entered the pasture of defendant and killed certain sheep belonging to him. Subsequently the dog returned, and was shot and killed by defendant near the inclosure in which the sheep were pastured. The court instructed the jury, that the defendant was justified in killing the dog, if the evidence satisfied them that the dog had destroyed the sheep, and had thereafter returned, and was on the premises of the defendant near his pasture, under circumstances calculated to produce a belief in an ordinary man, that the dog was lurking about the inclosure to commence again the work of destruction, and was killed under a reasonable apprehension that it was necessary to prevent a repetition of the mischief. Verdict and judgment for defendant. Plaintiff appealed.

J. H. Bryan, for the plaintiff.

Badger and Devereux, for the defendant.

GASTON, J. The exception taken by the plaintiff to the instruction of the judge, is not in our opinion well founded. The law authorizes the act of killing a dog found on a man's premises in the act of attempting to destroy his sheep, calves, conies in a warren, deer in a park, or other reclaimed animals used for

human food and unable to defend themselves: *Wadhurst v. Damme*, Cro. Jac. 45; *Barrington v. Sumers*,¹ 3 Lev. 28; *Leonard v. Wilkins*, 9 Johns. 233. Nor is it essential to the defendant's justification that the owner of the dog should be cognizant of his bad qualities, or that there was no other mode of defending the things assailed: Com. Dig., Pleader, 3 m, 33; 1 Sid. 336. The law is different where the dog is chasing animals *feræ naturæ*, such as hares or deer in a wild state, or combating with another dog. In these cases a necessity for the act of killing must be made out, or the killing will not be justified: *Wright v. Ramscot*, 1 Saund. 82; *Vere v. Lord Cawdor*, 11 East, 567. The object of the law in conferring this authority is not to punish past wrongs, but to prevent wrongs impending or menaced. It may therefore be exercised before the injury is begun, if in truth it be imminent—for otherwise the preventive remedy may be too late. Thus in the case of *Wadhurst v. Damme*, the plea was that the dog had killed conies before, and the defendant finding the dog running at conies (not in the act of killing them) he there killed the said dog. So in *Barrington v. Turner*, the justification was that the hounds had chased a deer in the defendant's park and killed her, and to prevent further mischief by them the defendant took and killed them. In this case the plaintiff's dog had actually killed several of the defendant's sheep upon his premises, and had returned apparently for the purpose of repeating the injury. It hath been always taken for the law, and universal usage is high evidence of the law, that a sheep-stealing dog, found lurking about, or roaming over a man's premises where sheep are kept, incurs the penalty of death.

The judgment below is affirmed.

By COURT. Judgment affirmed.

PLEA OF JUSTIFICATION TO AN ACTION OF TRESPASS for killing a vicious animal belonging to the plaintiff, does not generally require that the animal destroyed should have been engaged at the immediate moment of the killing, in injuring or destroying the defendant's property. It is sufficient, if it be proved that the facts under which the killing was accomplished were such as to justify a reasonable apprehension that injury or damage was about to be committed. The rule as here declared is affirmed, and the principal case cited in its support in *Morse v. Nixon*, 6 Jones, 293, and in *Williams v. Dixon*, 65 N. C. 417. It seems, however, that it is no justification to show that the animal had at different times committed depredations against the property of other persons, if such acts did not, in effect, give the animal the character of a public nuisance: See *Dodson v. Mock*, *post*.

1. *Barrington v. Turner*.

BLACKWELL v. LANE.

[4 DEVEREUX AND BATTLE'S LAW, 113.]

DELIVERY OF A BOND MAY BE COMPLETED WITHOUT ANY PARTICULAR FORM, and the intention to make such delivery inferred from the conduct or language of the party at the time.

BOND SUBSCRIBED BY WITNESS WITHOUT KNOWLEDGE OR CONSENT OF OBLIGOR is not on that account rendered void in law.

DEBT. Lane and Winningham executed a bond to Blackwell to secure Winningham's debt. The bond was brought to Leach, agent of the plaintiff, by Winningham, and though previously signed by the latter and Lane, was blank as to the amount. Leach, at the suggestion of Winningham, filled in the proper amount, and the latter then acknowledged it to be his bond, and requested Leach to attest it as a subscribing witness. Leach, observing that he must first see Lane, stepped into the street where Lane was standing, and presenting the instrument, inquired, "Do you acknowledge this to be your signature?" Lane, without having the instrument in his hand, responded that he did, and inquired the amount, upon learning which he expressed surprise that it was so much. Leach then retired to his office a few paces distant, and wrote his name upon the bond under the word "attest." Leach, upon the trial, testified that he subscribed the bond without the knowledge or consent of Lane, and that he afterwards handed it to plaintiff. Verdict and judgment for the plaintiff. Defendant appealed.

Mendenhall and Winston, for the defendant.

No appearance for the plaintiff.

DANIEL, J. 1. The defendant moved the court to instruct the jury that there was no evidence of a delivery of the bond declared on. The court charged, that to constitute a delivery, it was sufficient, if the bond being present, that the defendant made use of words showing his intention that the obligee should take it as the act and deed of the obligor. That when the bond was presented to Lane, if he acknowledged his signature with the intent that Leach (the plaintiff's agent) should retain it as the defendant's deed, and upon being told the amount did not object, then though it was for more than he expected, still, if retained by Leach as the defendant's act and deed, the jury should find there was a delivery. We do not perceive any error in this part of the charge. No particular form is necessary in the delivery of a bond; the mere throwing it on the table, or any

act or word from which the intention of the obligor to put the bond in the possession of the obligee may be inferred, is sufficient: Co. Lit. 36 a; Hurlestone on Bonds, 8.

2. The defendant contended, that the act of Leach in putting his name to the paper as a subscribing witness, vitiated and rendered the bond void in law—as there was no evidence he did so with the knowledge or consent of the defendant. On this point the court charged the jury, that if they believed the name of Leach was put on the bond as a subscribing witness under the circumstances stated by him, it did not vitiate the bond and render it void in law. We think in principle the case of *McCrow v. Gentry*, 3 Camp. 232, is very much like this. Action against the maker of a promissory note, which purported to be attested by two witnesses. One of these being called to prove it, stated that he did not put his name to it in the presence of the defendant, nor was he ever called upon by the defendant to attest it; but he saw the defendant deliver it as his note of hand to the payee, and he afterwards put his name to it without the defendant's knowledge. Lord Ellenborough: "I can not receive the evidence of this person as of an attesting witness to the note. He was no attesting witness, but a mere volunteer. If the other person whose name is on the note as attesting witness, really was so, it can only be proved by his evidence. It appeared, however, that this person had not put his name to it exactly under the same circumstances as the other, and the defendant's acknowledgment was considered sufficient to fix him. So the plaintiff had a verdict." The defendant acknowledged to Leach (the plaintiff's agent) that it was his bond. Leach was a competent witness to prove that fact. The name of this witness having been placed on the paper, purporting to be a subscribing witness, when in fact he did not put it there at the request or in the presence of the defendant, is not in our opinion such an addition or alteration of the bond as will vitiate or render it void. Lord Ellenborough, in the case quoted, did not consider the signature of the names of the two persons who had signed the note as if they were subscribing witnesses, such an alteration or addition as to destroy the instrument. If the witness had been dead, it is true, proof of his handwriting under such circumstances would not have been sufficient evidence to let the case go to the jury, for them to infer the due execution of the bond; other evidence would have been required, as proofs of the handwriting of the obligor, his acknowledgment, or the like: *Holloway v. Lawrence*, 1 Hawks, 49. In the case of *Tulbert v.*

Hodson, 2 Eng. Com. L. 91,¹ it appears that the attesting witness to a bond, wrote the attestation, when the obligor was not present, and without seeing the obligor execute it. The court, notwithstanding, permitted other evidence to be given of the execution by the obligor, and the obligor had a verdict and judgment. This is a strong case against the position taken by the defendant's counsel that the bond is void. The judgment must be affirmed.

By Court. Judgment affirmed.

This case is referred to in *State v. Gherkin*, 7 Ired. 209, as establishing the rule that the addition of the name of a subscribing witness, made after the signing and sealing of a bond, and without the knowledge or consent of the obligor, is not such a material alteration as will vitiate the instrument; and falsely placing the name of a person to a bond as a subscribing witness is not forgery. Cited and approved, also, in *Dunn v. Clements*, 7 Jones, 58.

MATERIAL ALTERATION OF WRITINGS: See upon this subject *Newell v. Mayberry*, 23 Am. Dec. 261, and cases cited in the note; also, note to *Woodworth v. Bank of America*, 10 Id. 267, where this topic is discussed at length.

DELIVERY OF A DEED MAY BE INFERRED from grantor's conduct at the time: *Chess v. Chess*, 21 Am. Dec. 350, and note thereto.

DODSON v. MOCK.

[4 DEVEREUX AND BATTLE'S LAW, 146.]

PROBINARY VALUE OF A DOG NEED NOT BE PROVED TO SUSTAIN TRESPASS against another for killing him.

JUSTIFICATION AS A DEFENSE TO AN ACTION FOR KILLING A DOG is not established by evidence showing such animal to have been merely troublesome at times, unless his disposition was such as to render him a nuisance to the community.

TRESPASS CAN NOT BE SUSTAINED TO RECOVER DAMAGES FOR CONSEQUENTIAL INJURIES; it is necessary to the maintenance of this action that the injury should immediately have followed the act complained of.

CASE IS THE PROPER REMEDY WHERE THE INJURY IS CONSEQUENTIAL and not immediate, and also even where the injury is immediate, if the act causing it be alleged as a consequence of negligence or inattention.

TRESPASS *vi et armis*. Plaintiff sued to recover damages for killing his dog. The value of the dog, it was stated by the court in charging the jury, need not be proved. The court further charged that although the dog, as was stated by the witnesses, had at one time stolen an egg from the premises of one person, and had caught a sheep upon the land of another, and had barked and jumped at others at different times, yet these

1. *Falbot v. Hodson*, 2 Eng. Com. L. 348; 8 C., 7 Taunt. 261.

facts did not justify the defendant in killing him. And further, that if they were satisfied from the evidence that the defendant killed the plaintiff's dog by throwing poison to him, or putting it down where he knew the dog would pass along and get it, the plaintiff was entitled to recover so far as the form of the action was concerned. Verdict and judgment for plaintiff. Defendant appealed.

J. T. Morehead and Boyden, for the defendant.

No appearance for the plaintiff.

GASTON, J. We are of opinion that, with a single exception, all the objections taken to the charge of the judge must be overruled. It was not necessary for the maintenance of the action that the plaintiff's dog should be shown to have pecuniary value. Dogs belong to that class of domiciled animals which the law recognizes as objects of property, and whatever it recognizes as property, it will protect from invasion by a civil action on the part of the owners. It is not denied that a dog may be of such ferocious disposition or predatory habits as to render him a nuisance to the community, and such a dog, if permitted to go at large, may be destroyed by any person. But it would be monstrous to require exemption from all fault as a condition of existence. That the plaintiff's dog on one occasion stole an egg, and afterwards snapped at the heel of the man who had hotly pursued him *flagrante delicto*—that on another occasion he barked at the doctor's horse, and that he was shrewdly suspected in early life to have worried a sheep—make up a catalogue of offenses not very numerous nor of a very heinous character. If such deflections as these from strict propriety be sufficient to give a dog a bad name and kill him, the entire race of these faithful and useful animals might be rightfully extirpated.

In that part of the charge which relates to the form of the action, we do not entirely concur with his honor. We hold with him, that if the poison had been directly administered (and the throwing it down to the dog mixed up with food is a direct administration of the poison), either by the defendant or by any other person under his direction, the action of trespass was the proper remedy. But we do not assent to the position, that "if it were put by the defendant in a place where he knew the dog would pass and get at it," and the dog afterwards passed by and swallowed the poison, the action of trespass might also be maintained. The distinction between injuries which are the proper subject of an action of trespass and those which are to

be redressed by an action on the case, between injuries immediate, and injuries consequential, is sometimes very subtle and attenuated. But the law makes the distinction, and the ministers of the law must follow it out. Acts which are of themselves invasions upon the person or property (in possession) of another, are of the first class, or immediate injuries. Acts which by reason only of subsequent occurrences, occasion an injury to the person or property of another, which injury was either foreseen or ought to have been guarded against, are the subject of an action by the party grieved, because of this consequent injury, and come under the second class. One of the most apt as well as ordinary illustrations of the legal distinction is thus stated. If A. throw a log in the highway and it hits B., he may maintain trespass; but if B. come along afterwards and fall over it, and thereby receive an injury, the remedy is case. Nor in the instance last put will it make any difference whether at the time the log was thrown, it was or was not known that B. was shortly thereafter to pass along and in all probability would stumble over it. There are indeed some instances where although the injury be immediate, it may be alleged as a consequence of negligence or inattention, and the action on the case be maintained. But we know of none where the injury is entirely an indirect consequence of a previous act, in which it may be complained of as a trespass with force and arms.

For this error we feel ourselves obliged to reverse the judgment rendered below and order a *venire de novo*.

By Court. Judgment reversed.

This case is cited in *State v. Latham*, 13 Ired. 33, to the point, that though at common law, a dog was a species of property which had no recognized value, and was not a subject of larceny, yet it is property, for an injury to which an action would lie, and therefore an indictment for malicious mischief for killing a dog may be sustained; also in *State v. Boon*, 4 Jones, 468, to the point, that whatever the law recognizes as property is presumed to be of some value. In *Morse v. Nixon*, 6 Jones, 294, the dictum of the principal case is disapproved, as erroneously assuming that any person other than the one specially incommoded or aggrieved, may abate a common nuisance; its authority, however, upon the express points decided is not questioned.

VICIOUS ANIMAL MAY BE KILLED BY ANY ONE, AS A NUISANCE, when the animal is generally known to be ferocious, savage, and dangerous to the persons or property of others: *Hinckley v. Emmerson*, 15 Am. Dec. 383.

TRESPASS VI ET ARMIS WILL LIE for injuries resulting from negligence if the omission complained of was the immediate and direct cause of the injury: *Percival v. Hickey*, 9 Am. Dec. 210; *Guille v. Swan*, 10 Id. 234.

FARLEY v. LEA.

[4 DEVEREUX AND BATTLE'S LAW, 169.]

JUDGMENT OF A COURT OF RECORD IS CONSIDERED TO HAVE BEEN RENDERED on the first day of the term by relation, irrespective of the day upon which it may, in fact, have been rendered.

JUDGMENT BY CONFESSION IS VALID without previous process, and is presumed to have been entered on the first day of the term, although the writ on which such judgment was confessed was not issued until afterwards.

JUDGMENT NEED NOT BE PROVED TO JUSTIFY A SALE UNDER EXECUTION issued upon such judgment, but in an action against an officer it is sufficient for him to show that in making the sale he acted under the authority of the writ, in obedience to the mandate of the court.

FIERI FACIAS TAKES EFFECT FROM THE FIRST DAY OF THE TERM at which it was issued, and, in the absence of statutory regulations, will enable the sheriff to seize the goods of a defendant even in the hands of a *bona fide* holder, who has purchased since the writ took effect.

FIERI FACIAS IS ENTITLED TO PRIORITY OVER A CONVEYANCE made on the second day of the term at which the writ was issued, notwithstanding judgment in the action was not, in fact, confessed, until after such conveyance had been made and registered.

TROVER. Plaintiff sued defendant, as sheriff, for selling certain property. Case was submitted upon an agreed statement as follows: Plaintiff held a deed of trust to the property executed to him by Crocket, dated May 9, 1833, and registered on the same day. The defendant, it was admitted, had sold the property mentioned, as sheriff of the county, at the instance of two of Crocket's creditors, under executions tested the Monday of the said term of said court, being the eighth day of May, 1833. These executions were issued on judgments confessed by Crocket on the twelfth of May, 1833. The writs in the actions in which the above judgments were confessed, were issued upon the eleventh and twelfth of May, 1833, respectively. The court being of opinion that plaintiff was entitled to recover, judgment was rendered accordingly. Defendant appealed.

W. A. Graham, for the defendant.

Winston, for the plaintiff.

GASTON, J. No position can be more firmly established than that the judgments of a court of record, on whatever day of the term they may in fact be rendered, in law relate to, and are considered as judgments of the first day of the term. This is admitted by the plaintiff's counsel to be the general doctrine, but its application to the judgment in the case before us is denied, because the writ on which the defendant therein acknowledged

service is noted by the clerk to have been issued on a day subsequent to the first day of the term, and therefore it is inferred that the judgment could not have been in fact rendered on the first day of the term. It may well be questioned whether this be a necessary inference, for a judgment by confession is valid without any previous process. But admit the inference to be irresistible, the fact so inferred is wholly immaterial. In the language of the court, in the case of *Johnson v. Smith*, 2 Burr. 967, "the reason why nobody shall be permitted to aver that a judgment was signed after the first day of the term, or that a *jieri facias* was taken out in the vacation, is because the fact is not relevant; the legal consequences do not depend on the truth of the fact on what day the judgment was completed or the writ actually taken out; but upon the rule of law that they shall be deemed complete and bind to all intents and purposes by relation." That a judgment rendered in fact on a late day of the term is as operative as though it were rendered on the first day thereof seems incontestable. Where a testator died in term time before a judgment was signed, it was held that it might be signed after, and execution taken out against his goods in the hands of his executor tested the first day of the term, for they relate to, and are considered as a judgment and execution of the first day of the term, at which day the testator was alive: *Bragner v. Langmead*, 7 T. R. 20; See also *Fann v. Atkinson Willis*, 427; *Waghorne v. Langmead*, 1 Bos. & Pul. 571. So where a testator gave a warrant of attorney to confess a judgment, and died within a year afterwards, so that a judgment might be entered up without leave of the court, it was held that a judgment entered up after his death related to the first day of the term of which it was entered, when he was living, and that an execution tested of that day might be levied on his goods in the hands of his executor: *Odes v. Woodward*, 2 Ld. Raym. 766, 849; 1 Salk. 87. See also *Robinson v. Tonge*, 3 P. Wms. 397. This legal relation of the judgment to the first day of the judicial term is as perfect as was at common law the relation of an act of parliament to the first day of the legislative session. No matter on what day of the session the statute was enacted, unless a certain time were therein appointed when the same should first take effect, it had relation to the first day of the parliament, and from that day was accounted in law a perfect act: *Partridge v. Strange and Croker*, 1 Plow. 79; *Attorney-general v. Panter*, 6 Bro. P. C. 533;¹ *Latless v. Holmes*, 4 T. R. 660. The inconveniences found to re-

1. 6 Bro. P. C. 486.

sult from the law of relation as applied to statutes, have been remedied both in England and in this country by positive legislation. The law of relation applicable to judgments has been in part changed in that country by the statute of 29 Chas. II.; but in this state it remains as it was at common law.

But the controversy in this case does not depend upon the relation of the judgment. The defendant is protected by the writ of *feri facias*, and he is not bound to show any judgment: *Cotes v. Mitchell*, 3 Lev. 20. It is sufficient for his defense that he has acted in obedience to a mandate proceeding from a court of competent authority. The *feri facias* was tested of the first day of the term, and it is not to be questioned but that, at common law, the goods of a defendant are bound from the teste of a *feri facias*, and may by virtue thereof be taken in execution by the sheriff in the hands of a person who had *bona fide* purchased them since the teste of the writ. In England the statute of 29 Chas. II. has provided that, against purchasers, no writ of execution shall bind the goods but from the time such writ was delivered to the sheriff. We, however, have no such statute here, and therefore with us the writ binds against all persons from the teste, as it yet does in England where purchasers are not concerned.

The counsel for the plaintiff has objected that it does not appear that the *feri facias* was returned by the sheriff. Whatever weight the objection might have, if it appeared that the writ had not been returned, the court is of opinion that this case is not open to the objection. It is manifest that the sole question presented for decision upon the facts agreed is, whether the *feri facias* or the conveyance to the trustee be entitled to priority. The proceedings of the sheriff upon the writ—if in law such writ was entitled to the priority—must be understood to have been rightfully and regularly done.

This court being of opinion that the execution did bind from its teste, and that teste being prior to the registration of the deed, it follows that the judgment below must be reversed and judgment upon the case agreed be rendered for the defendant.

By COURT. Judgment reversed.

Referred to in *Faust v. Trice*, 8 Jones, 494, as authority for the principle that all acts of a court of record are, by the doctrine of relation, considered as having been done on the first day of the term, and an order of court denying a motion for continuance is not affected by a statute passed between the time of the first day of the term and the entry of the order, the provisions of which were intended to withdraw such motions from the ordinary discretion of the court. Cited also in *Harling v. Spiney*, 8 Ired. 63, to the point

that a *feri facias* takes effect as a lien from the day it is tested, and binds the property of the debtor so as to avoid any alienation by him, made afterwards, and that the lien thus created is continued and preserved by alias writs issued regularly from time to time after the original. In *Rutherford v. Rayburn*, 10 Ired. 144, the principal case is cited and affirmed upon the principle that a sale under execution is protected by the writ itself, and in an action between the defendant in execution and the sheriff or purchaser at the sale, no judgment need be shown. Affirmed also in *Symons v. Northern*, 1 Jones' L. 241, upon the point that a judgment by confession is valid and effectual without any previous process against the defendant in the action. And in *Finley and Lea v. Smith*, which was an action of ejectment brought by the purchaser at the sale out of which the principal case arose, against the defendant, who claimed title to the same premises under a conveyance by the trustee in that case, the court approved their former decision, and affirmed a judgment for the plaintiff in the action, although it appeared that the lessors of plaintiff procured the judgments by confession mentioned in the principal case, with a full knowledge of the existence of the conveyance in trust.

LIEN OF AN EXECUTION TAKES EFFECT from the date of its tests, so as to avoid a transfer of the defendant's property made subsequently: *Hickman v. Caldwell*, 27 Am. Dec. 274 and note, in which the decisions in this series upon this principle are collected. See also *Battle v. Behring*, Id. 526.

UPON THE POINT WHETHER A WRIT OF EXECUTION IS EVIDENCE IN JUSTIFICATION of a sale under it, without proof of the judgment upon which it was issued, see *Carleton v. King*, 23 Am. Dec. 295 and note; *McGuire v. Kouns*, 18 Id. 187; *Dufour v. Camfranc*, 13 Id. 365 and note.

LIEN OF A JUDGMENT DOES NOT RELATE BACK to the beginning of the term so as to charge the real estate of the judgment debtor prior to its rendition: *Pope v. Braddon*, 20 Am. Dec. 49. As to time when lien of judgment becomes effective, see *Coombs v. Jordan*, 22 Id. 236 and note; also *Matter of Howe*, 19 Id. 395.

METTS v. BRIGHT.

[4 DEVEREUX AND BATTLE'S LAW, 173.]

JUSTICE'S EXECUTION IS RENDERED EFFECTUAL BY LEVY and binds personal property only from and after the time when the levy is completed.

DEED FILED FOR REGISTRATION TAKES PRECEDENCE OVER LEVY made under execution issued on the same day when the facts show the execution to have been issued after the deed was filed.

LAW REGARDS FRACTIONS OF A DAY, WHEN TIME IS MATERIAL, and will take notice of the hour of the day at which an act was accomplished.

TIME OF DELIVERY OF DEED FOR REGISTRATION MAY BE PROVED BY PAROL when the register has neglected to note the exact time at which such delivery was made.

OMISSION OF REGISTER TO NOTE THE TIME OF DELIVERY OF DEED FOR REGISTRATION does not invalidate the registration, although the law requires the register to make an indorsement thereof on the deed.

REGISTRATION OF A DEED IS DEEMED TO BE COMPLETE from the time it was commenced, and is effective, operative, and conclusive from that moment.

TRESPASS vi et armis. Stephens being indebted, conveyed certain property by a deed of trust to Metts, the plaintiff, as trustee, to secure the payment of the debt. Stephens retained possession of the property. The deed above mentioned was dated October 11, 1837, and on the same day at seven o'clock P. M. was deposited in the register's office for registration. No memorandum was made on the deed by the register, of the hour of its delivery to him. He immediately, however, commenced to enroll it and continued until it was completed, when it was by him indorsed: "Enrolled in the register's office, October 11, 1837." At nine o'clock P. M. of the same day a judgment was rendered against Stephens and an execution immediately issued thereon by a justice of the peace, and, by the direction of the person who had obtained the judgment, the defendant Bright levied upon and seized the property mentioned in the deed of trust to plaintiff above referred to. For this levy and seizure, the plaintiff, as trustee, brought this action. Judgment for plaintiff. Defendant appealed.

J. H. Bryan, for the defendant.

No appearance for the plaintiff.

DANIEL, J. Justices' executions bind personal property only from the levy: 1 R. S., c. 45, sec. 16. Mortgages and deeds in trust are good against creditors and purchasers only from the date of the registration: Id., c. 37, sec. 24. In this case, the registration of the deed from Stephens, under which the plaintiff claims, and the constable's levy under the justice's execution against the said Stephens, under which the defendant claims, were made on the same day, to wit, the eleventh of October, 1837. The deed in trust had been proved, and was delivered to the register at seven o'clock P. M. on that day, and he immediately commenced registering it, and continued until the same was completed. The indorsation on it simply is "Enrolled in the register's office the eleventh of October, 1837." The defendant's judgments were obtained at nine o'clock P. M. the same day—executions were immediately issued, and the constable levied, on the same day, on the property contained in the plaintiff's deed in trust. The judge said that the law does not regard the fractions of a day unless time be material, but that it will take notice of a prior and a posterior when it is necessary for the ends of justice. This opinion was correct. It is a maxim, that in law there is no fraction of a day: Co. Lit. 135, 136; 9 East, 154;¹ 11 Id. 496;² 4 T. R. 660.³ Yet that doctrine no longer prevails when

1. *Field v. Jones.*

2. *Dee v. Swenor.*

3. *Lattin v. Holmes.*

it becomes essential for the purposes of justice to ascertain the exact hour or minute: 9 East, 154; 3 Co. 1;¹ 3 Burr. 1434;² 2 Barn. & Ald. 586;³ 3 Chit. Pr. 118. The legislature directs (1 R. S., c. 37, sec. 26) that the register shall indorse on each deed of trust or mortgage, the day on which it is delivered to him for registration, and such indorsement shall be entered on the register's books, and form a part of the registration; and he shall immediately thereafter register such deeds in the order of time they are delivered to him. The direction contained in this section of the act, was intended to preserve the best evidence of the fact of priority in delivery and registration of deeds of trust and mortgages. The register is subject to an action and an indictment if he omit this duty. Certainly it is not essential to the validity of a registration, that the day of delivery to the register should be indorsed on the deed and registered with it in the books of the office. If this duty is not performed by the register, it may be questionable whether the registration can refer back to an antecedent day by means of parol evidence of that fact. But there is no claim on the part of the plaintiff here to carry back the registration beyond the day whereon it was registered and certified to have been registered. Our legislature have not been as particular as the British parliament have been in framing some of their registry acts. It has not directed the register to note the hour of the day when deeds shall have been delivered into his office. In *McKennon v. McLean*, 2 Dev. & B. L. 79, this court held that "registration in itself is but one thing, necessarily, indeed, made up of successive operations, consuming more than an instant of time; and as the registration can not be said not to exist at any instant after it was begun, the intermediate lapse of time is not regarded, and the whole relates to the first moment, so as to make the act operative therefrom. From the beginning the whole is one continuing act, and therefore in legal contemplation, it is done from the commencement." The registry of the plaintiff's deed in trust was commenced, if not finished, before the defendant's levy. We are, therefore, of the opinion that the law was properly expounded by the superior court, and the judgment must be affirmed.

By Court. Judgment affirmed.

Cited and affirmed in *Parker v. Scott*, 64 N. C. 121, to the point that in contemplation of law a deed of trust is deemed to be registered from the moment of its delivery to the proper officer for that purpose, and takes effect as against the creditors of the person by whom it is executed from that time.

1. *Ogden's case*.

2. *Combe v. Pitt*.

3. *Houlbrooke v. Desanges*.

RECORD OF A DEED TAKES EFFECT from the moment of its delivery to the recording officer, and is thereafter constructive notice of its existence: *Beall v. Barnum*, 23 Am. Dec. 339, in the note to which the cases in this series to the effect stated are collected.

EFFECT OF IRREGULARITIES AND ERRORS IN RECORDING DEEDS: See note to *Sawyer v. Adams*, 30 Am. Dec. 459.

BRADSHAW v. ELLIS.

[3 DEVEREUX AND BATTLE'S EQUITY, 20.]

DEVISE OF HIS PLANTATION may include two separate tracts of the testator, half a mile distant from each other, but which were usually cultivated together as one farm.

DEVISE WHICH CONTAINS A SPECIFIC DIRECTION that all of testator's property shall remain upon his plantation, consisting of two separate tracts of land, in charge of his wife, until his youngest son shall attain full age, and then proceeds to bequeath one tract to that son and another, and one third of the remaining tract to his wife, for her life, vests in the wife, by implication, a chattel interest in the whole of both tracts, during the son's minority.

EMBLEMENTS UPON LAND NOT DEVISED are personal assets, and as such belong to the executor.

ELLIS died possessed of three tracts of land and a quantity of personal property. The tracts of land mentioned were, respectively, the tract upon which deceased had resided; another, called the Kelly tract, half a mile distant from that first mentioned, but cultivated with it as one farm; and, lastly, a tract known as the mill tract, several miles distant from either of the others. The will of deceased, in regard to the lands mentioned, directed that all of his property should remain upon his plantation, in the care of his wife, until his son William Anderson Ellis should arrive at full age, when it was directed to be divided among a number of legatees; but, in case of the death of his wife before the son should attain his majority, the division was directed to be made immediately. The will then proceeded to make sundry bequests of the tracts above named. To his sons John and William Anderson Ellis, on the latter arriving at full age, he gave the above-mentioned Kelly tract. To his wife, he gave and bequeathed, during her natural life, one third of the tract upon which, at the time of his death, he resided. No specific disposition of the remaining two thirds of the last-named tract was made. The will then proceeded to direct his executor to sell the whole of the mill tract, and to divide the money among several daughters, one of whom is the plaintiff in this action.

The plaintiff contended that the testator died intestate as to two thirds of the tract first mentioned; that the second tract descended to the heirs of testator, until William, the youngest son, should arrive at full age; and that the crop growing upon the mill tract at the time of testator's death, belonged to the heirs. The only questions presented, were as to what was the proper construction to be given to the clauses of the will above mentioned.

J. T. Morehead, for the plaintiffs.

Caldwell, contra.

DANIEL, J. After examining the whole will, we are of opinion that the testator did not mean by the words "my plantation," to confine the care of his wife only to the home tract of five hundred and sixty-five acres; but that he designed to embrace under this designation the two tracts which he cultivated together as one farm. It seems to us that a chattel interest in the other two tracts of land passed to the widow, as trustee for the children named in the will, until William should come of age, or until the death of the widow, if that event should happen before William came of age. That this construction is right, is fortified by the fact that the testator, when devising his lands in other parts of his will, does not make use of the word "plantation," but he uses the words "tract of land." Again, he devises his Kelly tract of land to his two sons, John and William, on William's attaining full age; showing his intention that it (the Kelly tract) should go to some other person until that period arrived. If no other person could be designated, by implication plain in the will, to take, then the heirs at law would take. But the testator does say, all the property not devised is to remain in the care of his wife, to be managed by her until William shall come of age. If the words are not express, the implication is plain, that the wife should take the Kelly tract. When William shall come of age, the chattel interest of his mother (if she then be alive) will cease, and John and William will be entitled to the possession of the Kelly tract. The two tracts, viz., the home tract and the Kelly tract, pass to the widow under the words "my plantation."

The second question raised by the bill has been decided by the court, in giving the opinion on the first question. "I give to my sons John and William A. Ellis, on William A. Ellis arriving at full age, my tract of land which I purchased of Mrs. Kelly," etc. Does this tract of land descend to the heirs at law, until

William arrives at age? We have before said that the widow has a chattel interest in this tract. If the widow should die before William comes of age, who would be entitled to take the Kelly tract from her death unto the time of William's coming of age, is a question not necessary now to be answered. The heirs at law, as such, at present have no vested rights in this tract of land.

The third question submitted, did the emblements which were on the mill tract of land, at the death of the testator, go to the persons who were to have the proceeds of the sale of the said tract? The clause in the will is as follows: "It is my will that my executor sell the whole of my mill lands, on a credit, for the best price that can be obtained, the money arising from said sale to be equally divided between my daughters," etc. The mill tract is not devised to the daughters, nor to the executor to sell. The executor has only a naked power to sell and divide the money produced by the sale of the land, and not the crop growing on the land at the death of the testator. The mill land descended to the heirs at law, subject to the power in the executor to sell. The emblements on lands which descend to the heir belong to the executor, and are personal assets. We therefore declare, that no part of the emblements which were on the mill tract the year the testator died, belong to the plaintiffs under this clause in the will. As to the remaining question, which respects two thirds of the home tract, if Mrs. Ellis shall be alive when William arrives at full age, then she, by the will, becomes entitled to but one third of that tract of land for her life. The other two thirds not having been disposed of by the will, then will go to the heirs at law until the death of the widow. On her death, the executor has a power to sell this tract, and divide the money among the daughters mentioned. The plaintiffs at present are not entitled to any of the demands set forth in their bill: therefore the bill must be dismissed.

By COURT. Bill dismissed.

CONSTRUCTION OF DEVISES BY WILL must be in accordance with the intention of the testator, as manifested in the will itself: *Kean's Lessee v. Heffecker*, 29 Am. Dec. 336; *Scott v. Nelson*, Id. 286; *Covenhoven v. Schuler*, 21 Id. 74; in the notes to the foregoing cases, the different authorities bearing upon this proposition are collected.

WORDS IN A WILL SUFFICIENT TO CONVEY A FEE, or to pass the title to realty: See *Godfrey v. Humphrey*, 29 Am. Dec. 621; *Tolar v. Tolar*, 14 Id. 575; the notes to these cases contain citations of the leading cases on this subject reported in this series and at large.

SPECIFIC BEQUESTS, EFFECT AND CONSTRUCTION OF: *Frierson v. Van Buren*, 27 Am. Dec. 528; *Theall v. Theall*, 26 Id. 501; *Shearman v. Angel*, 23 Id. 166; *Jackson v. Winne*, 22 Id. 563.

CROPS GROWING ON LAND AT TIME OF TESTATOR'S DEATH, vest in the executor as against the heir, but as between the executor and devisee, the latter becomes entitled to them: *Smith v. Barham*, 25 Am. Dec. 721; *Coombs v. Jordan*, 22 Id. 236; grain growing on land does not pass under a description of personal property in a will: *Kinsman v. Kinsman*, 1 Id. 37.

The principal case is cited in *Stowe v. Davis*, 10 Ired. 431, to the effect that under the term "my plantation" in a will, a tract of land purchased by the testator, adjoining that on which he had previously resided, passes to the devisee; in *Woods v. Woods*, 2 Jones' Eq. 420, cited to the point that under a devise describing land as "the tract of land whereon I now live and reside, containing two hundred and twenty-five acres, more or less," the title passes, not only to the original tract owned by the devisor, but to several others subsequently bought and cultivated together with the first tract, although the aggregate number of acres greatly exceeded that stated in the will; in *Rogers v. Brickhouse*, 5 Id. 301, the testator at the time of making his will, was the proprietor of a tract of land known as the "Goodwin tract," to which he afterwards added two other tracts, acquired by purchase, and adjoining that originally owned by him. It was held on the authority of the principal case, by the court, in construing a devise, by testator, that the entire parcel was intended, though it was devised under the general denomination of the "Goodwin tract;" cited, also, in *Jones v. Norfleet*, 7 Jones, 473, to sustain a similar construction of a devise by will, the court deciding, that where testator, owning a parcel of land embracing two town lots, had built a house on one lot, and permitted his devisee, a woman, to occupy it, and also to inclose and use a portion of both lots as a garden, the whole parcel, embracing both lots, passed under a devise to her of "the lot of ground and house thereon erected in said town where she now lives;" approved, also, in *McLennan v. Chisholm*, 66 N. C. 100, and in *Harvey v. Harvey*, 72 Id. 570, in relation to the construction to be given to the words "my plantation" in a will; cited and affirmed, also, in *Edwards v. Tipton*, 77 Id. 222, and in *Jones v. Robinson*, 78 Id. 396, in support of the general principle laid down, that the intention of the testator is to be divined from the whole will, the former case holding similar words of description in a deed to be a latent ambiguity, to explain which parol evidence is admissible.

VANN AND GREGORY v. HARGETT.

[2 DEVEREUX AND BATTLE'S EQUITY, 31.]

EQUITY WILL ENTERTAIN JURISDICTION FOR THE PREVENTION OF A MULTIPLICITY OF SUITS, in an action in which a general legal right, in respect to property, is sought to be enforced against several persons claiming portions of the same property, by titles that are individual, separate, and distinct.

PLAINTIFF'S RIGHT TO RECOVER BY AN ACTION AT LAW, will not preclude him from obtaining relief in equity where there are numerous adverse claimants, whose rights are several and distinct.

EQUITY JURISDICTION, IN AN ACTION by a plaintiff claiming a general legal
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right, is not confined to those cases in which a judgment at law against one of numerous adverse claimants, would not effectually protect the plaintiff's rights from future disturbances from the same cause or by the same person.

BILL IN EQUITY IS NOT DEMURRABLE FOR MULTIFARIOUSNESS where the plaintiffs claim by a single, general, and entire right, although in opposition to the distinct and separate rights of several defendants.

PLAINTIFF SHOULD ORDINARILY ESTABLISH HIS RIGHT AT LAW before seeking relief in equity upon the ground of the prevention of a multiplicity of suits, but where the parties are numerous and can not be ascertained, this rule is relaxed.

BILL IN EQUITY MAY BE SUSTAINED BY SEVERAL PLAINTIFFS on behalf of others jointly interested with them, when it is alleged in the bill, that the persons not made parties to the action, are unknown or not within the jurisdiction of the court.

DECREE IN EQUITY UPON A BILL BROUGHT BY SEVERAL PLAINTIFFS on behalf of a greater number having a joint and equal interest in the subject of the action, will bind the persons who are not parties to the bill, so far as to determine the validity of their claim as a just demand, but such parties will not be bound by an account taken in the action, until they have been allowed an opportunity to be heard.

BILL in equity. In 1783, Joseph Gilbert died testate, bequeathing to his daughter Mary Ann, wife of John Gregory, two $\frac{1}{2}$ male slaves for life, with remainder to all her children, to be equally divided between them. The will was duly probated and its provisions carried out. The bill in this action was filed in 1824. It alleged that Mary Ann Gregory, the legatee above stated, died in 1826, leaving eleven children, of whom the wife of plaintiff Vann was one, and the plaintiff Gregory another. That the other children, whose names were set forth, had removed to other states unknown to the plaintiff, or had died and were without representation in this state. That John Gregory had, during the life-time of his wife Mary Ann, sold the life-interest of his wife in the two slaves above mentioned to Peter Hargett. That the defendants, who were twelve in number, had possession of some of the issue of the two slaves named under a claim of title derived from Hargett, and had set up an absolute title thereto. Peter Hargett had, before the commencement of this action, died. No persons were made parties as personal representatives either of Peter Hargett, or of John or Mary Ann Gregory. The bill prayed that the persons unknown, claiming an interest similar to plaintiffs, might be made parties in such manner as the court might direct; that the defendants claiming under Peter Hargett might be decreed to surrender the slaves in their possession, or to account to plaintiffs for their value if they had sold them, and for their hire since the death of

Mary Ann Gregory. Defendants demurred, first, because plaintiffs had a remedy at law by an action of trover or detinue; second, because of multifariousness. Demurrer overruled. Defendant appealed.

J. H. Bryan, Haywood, and Winston, for the plaintiffs.

W. C. Slanky and Badger, contra.

DANIEL, J. (after stating the substance of the bill). The first cause assigned for demurrer, is because the plaintiffs have a remedy at law by action of trover or detinue. After what was done by the county court, and the long possession of the slaves by and under the mother (tenant for life of the legacy), the title of the plaintiffs seems to be admitted on both sides to be a legal title; we also think it is a legal title. But if the plaintiffs could by any possibility recover at law, that is not a reason sufficient, in a case like the one disclosed by this bill, why they may not also proceed in equity. The plaintiffs claim by, and seek to establish in themselves, one legal title to the slaves, as against each and all the numerous defendants now holding the same. The plaintiffs claim as executory devisees after the death of their mother, by force of the bequest in Joseph Gilbert's will. Lord Redesdale says, courts of equity will take jurisdiction and prevent multiplicity of suits at law. And the cases in which it is attempted, and the means used for that purpose, are various. With this view, where one general legal right is claimed against several distinct persons, a bill may be brought to establish the right: *Mitf. Pl. 145*. Thus, where a right of fishery was claimed by a corporation throughout the course of a considerable river, and was opposed by the lords of manors and owners of land adjoining, a bill was entertained to establish the right against the several opponents, and a demurrer was overruled: *Mayor of York v. Pilkington*, 1 Atk. 282. But it is argued here by the defendant's counsel, that this right to come into equity by a plaintiff, who claims one general legal right against several distinct persons, is confined to those cases where a judgment at law against any one of the many adverse claimants would not quiet the plaintiff against future disturbances and trespasses, even by that very defendant himself; as in the case referred to in *Atkins*. If any of the defendants had been sued at law for fishing in the river under their claim of a several fishery, and the plaintiff's title to a sole and separate fishery had been established, still the plaintiff could have recovered at law only for the injury which he had sustained before

issuing his writ; and he would, on a second trespass even by the same defendant, be compelled to bring a new action. That when the plaintiff, having the legal title, is liable to be harassed by a number of persons claiming the same thing adversely to that title, the plaintiff at law having no other remedy but to sue *toties quoties* as each and every one of those adverse claimants may make trespass, then and then only, as law can not give complete relief, will the court of equity step in and give its aid, by ordering all the adverse claimants to submit their rights to one trial at law, or an action to be brought by or against one, or a few of the many claimants, as may be directed. And if the plaintiff's legal right be established on that trial, then all the adverse claimants, however numerous, shall and will, in equity, be forever enjoined, and the plaintiff forever quieted in his title and rights. And it is denied that except in cases of this kind only, will a court of equity entertain jurisdiction, to prevent a multiplicity of suits at law. The answer which we give to this argument is, that the case put by the counsel is but one among many where equity will interfere to prevent a multiplicity of suits at law. The cases in which it is attempted, and the means for that purpose, "are various," says Lord Redesdale. The case in *Atkins* is put as one among many in illustration of this rule. The object of a court of equity in entertaining such a bill, is to prevent multiplicity of suits at law by determining the rights of parties upon issues directed by the court, if necessary, for its information, instead of suffering the parties to be harassed by a number of separate suits, in which each suit would only determine the particular right in question between the plaintiff and defendant in it. The notion, that equity interposes only to prevent a multiplicity of actions *toties quoties* as the trespasses are committed, is answered again by stating, that such a bill can scarcely be sustained, where a right is disputed between two persons only, until the right has been tried and decided at law: *Mitf.* 146. We think the first cause of demurrer must be overruled.

The second cause assigned for demurrer, is for multifariousness. It is said, that the interest of each of the defendants is separate, and that neither one has any concern in the defense of their co-defendants. The court will not permit a plaintiff to demand by one bill several matters of different natures against several defendants; for this would tend to load each defendant with an unnecessary burden of cost, by swelling the pleadings with the state of the several claims of the other

defendants, with which he has no connection. But a demurrer of this kind would hold only when the plaintiffs claim several matters of different natures. But when one general right is claimed by the bill, though the defendants have separate and distinct rights, a demurrer will not hold: Mitf. 182; *Dunn v. Dunn*, 2 Sim. 329; *Maud v. Acklon*, Id. 331. The plaintiffs do not claim several separate and distinct rights in opposition to the several separate and distinct rights claimed by the defendants. But they claim one general and entire right, though it may be opposed by distinct rights claimed by the several defendants: Mitf. 182; *Burke v. Harris*, Hard. 337. This ground of demurrer is therefore overruled.

The third cause of demurrer assigned *ore tenus* is, that the plaintiffs should have established their titles at law, at least in one action, before they filed their bill. The answer is, that indeed in most cases it is held that the plaintiff ought to establish his right by a determination of a court of law in his favor, before he files his bill in equity: Mitf. 146, 3d Am. ed. But it is not always necessary to establish a right at law before filing a bill, as in cases of owners of patents, copyrights, etc., where the right appears of record: Id. 147. Nor will it be required where there are not the ordinary means of trying it at law: Id. In this case, from the vast number of the parties interested, and the difficulty of ascertaining them without the aid of this court, it is not practicable to bring a suit at law in which the plaintiffs will not be exposed to defeat upon technical objections. And if a suit at law should be deemed necessary to establish the title, that suit can be brought under the direction of a court of equity with all the requisite facilities for a trial upon its merits. This cause of demurrer, we think, is not sufficient.

The fourth cause of demurrer, assigned also *ore tenus*, is that the plaintiffs, by their own showing on the face of the bill, have not made all the proper and necessary parties, there being other persons who are interested in the executory devise. The old rule, that all persons having any charge upon, or interest in the estate, however numerous, must be made parties, has been dispensed with for purposes of convenience, when it is impracticable or extremely difficult to make them parties: 11 Ves. 429;¹ 2 Madd. Ch. Pr. 182; 1 Johns. Ch. 349,² 437.³ When a sufficient reason to excuse the defect of parties is suggested by the bill—as when a personal representative (as here) is a necessary party—and the bill states that the representation

1. *Adair v. New River Co.* 2. *Wendell v. Van Rensselaer.* 3. *Wiser v. Blackly.*

is in contest in the ecclesiastical court, an objection for want of parties will not hold: 2 Atk. 51;¹ 2 Madd. Ch. Pr. 178. The plaintiffs have stated in their bill that several of the children of Mary Ann Gregory removed out of the state and have died abroad, and that there are no representatives on their estates in this state. Neither are there any administrators on the estates of John and Mary A. Gregory, and therefore it is impracticable to make them parties. If the persons interested are out of the jurisdiction of the court, and it is stated so in the bill, and proved, it is not necessary to make them parties. And though in these cases the court can not compel them to do any act, it can proceed against the other parties; and if the disposition of the property is in the power of such other parties, the court may act upon it: *Smith v. Hibernian Mine Co.*, w. 1 Sch. & Lef. 240; *Williams v. Wingates*, 2 Bro. C. C. 399; 1 Jac. & W. 369.² The plaintiffs in this bill admit the rights of their deceased father, mother, brothers, and sisters; and also the rights of those alive who reside out of the state. They allege the want of administration on the estates of the deceased persons, and the absence of others, as one reason why they did not proceed at law. The rights of the plaintiffs, which may be ascertained under a decree in this case as just demands, will hereafter be binding on those interested, who are not now parties to this bill. But those not parties will not be bound by any account taken in this cause until they have the means to contest the facts: 1 Madd. 529;³ Mitf. 171; *Good v. Blewitt*, 19 Ves. 336. This may be an inconvenience to the defendants; but a greater inconvenience would exist on the other side if the plaintiffs should be entirely deprived of their rights, because, according to the old rule, all interested were not parties, when the plaintiffs show that it is impracticable to make them parties. The law will not force the plaintiffs to be at the responsibility of administering on the estates of all the deceased relations.

We are of the opinion that the demurrer must be overruled, and the decree below affirmed with costs.

By COURT. Order affirmed.

LEGAL REMEDY DOES NOT BAR EQUITABLE RELIEF where money, for which plaintiff sues, was received by defendant as trustee: *McCrea v. Purmont*, 30 Am. Dec. 103; a court of equity will not decline to entertain jurisdiction of a cause, merely because the plaintiff may have a remedy at law, if the parties have submitted themselves to the jurisdiction of the chancellor without objection: *Bank of Utica v. Utica*, 27 Id. 72; bill of peace will not be entertained

1. *Plumbet v. Penson*. 2. *Went v. West Middlesex Water Works Co.* 3. *Angell v. Hadden*.

by a court of equity where the right is controverted by two persons only, until after the right has been established satisfactorily by a trial at law: *Nevitt v. Gillespie*, 26 Id. 696; equity will not interfere where there is a complete redress at law, as in the case of a void judgment which may be set aside at law; nor will it relieve from the consequences of neglect to make a proper defense at law: *Armsworthy v. Cheshire*, 24 Id. 273; relief in equity will usually be granted when the party making application has a clear legal right for which there is no remedy in any other jurisdiction, if the party against whom the relief is prayed is amenable to the jurisdiction of the court, and it can afford effectual relief according to its ordinary methods of proceeding: *Bowden v. Schatzell*, 23 Id. 170; party resorting to equity who has a legal remedy, is bound, wherever he would have been at law: *App v. Driesbach*, 21 Id. 447; remedy at law against surety is no objection to bill in equity against principal: *Middletown Bank v. Russ*, 8 Id. 164; if a party has once submitted his rights to the judgment of a court of law competent to adjudicate them, equity can not grant relief: *Risher v. Roush*, 22 Id. 442 and note thereto.

BILL OF PEACE TO PREVENT A MULTIPLICITY OF SUITS will usually be sustained in equity, where the subject-matter of the contest is held by one individual, in opposition to a number of others who controvert his right, and who hold separate and distinct interests depending on a common source: *Nevitt v. Gillespie*, 26 Am. Dec. 696; *Fellows v. Fellows*, 15 Id. 412; *Hughlett v. Harris*, 12 Id. 104.

JOINDER OF PARTIES DEFENDANT IN EQUITY, is generally allowed to the extent of including such as are unconnected, if the interest between them is connected and entire, and centers in the point in issue: *Fellows v. Fellows*, 15 Am. Dec. 412, in the note to which a full review of the authorities bearing upon this subject will be found.

EQUITY WILL NOT INTERFERE WHERE THE REMEDY AT LAW IS ADEQUATE, and entitles the party to entire and complete redress: *Willet v. Overton*, 1 Am. Dec. 72; if the remedy at law has been lost, chancery will not revive in the absence of accident, fraud, or mistake: *Waters v. Riley's Adm'r*, 18 Id. 302.

The principal case is cited and approved in *Spivey v. Jenkins*, 1 Ired. Eq. 126, to the point that the ordinary practice in equity, where some of the defendants are beyond the jurisdiction of the court, and that fact is alleged in the bill, is to allow the others to be proceeded against notwithstanding; and also in *Robertson v. Stephens*, Id. 247, in support of the rule that the objection of multifariousness to a bill in equity, depends not so much on whether each party is connected with each branch of the case, but whether the bill seeks relief in regard to matters which are in their nature separate and distinct.

COOPER v. WILCOX.

[2 DEVEREUX AND BATTLE'S EQUITY, 90.]

SURETY ON AN APPEAL BOND IS EXONERATED FROM LIABILITY if, after the judgment is affirmed, and execution issued thereupon, the latter is released at the instance of the creditor, and the goods seized thereunder restored to the principal debtor.

ACTIVE DILIGENCE IS NOT REQUIRED in order to bind the surety, and mere forbearance or delay would furnish no ground upon which the surety could ask to be exonerated.

MONEY PAID BY A SURETY UPON A JUDGMENT AT LAW AGAINST HIM, may be recovered in equity, when, by reason of the neglect of the creditor in releasing an execution against the principal debtor, the liability of the surety is, in effect, extinguished.

BILL in equity. Wilcox sued Alston at law in the county court, and obtained judgment. Alston appealed to the superior court, with plaintiff as surety upon his appeal bond. The appeal having resulted adversely to Alston, judgment was thereupon rendered against him and the plaintiff, as surety, and a writ of execution issued accordingly. The execution was levied upon Alston's property, and a sufficient quantity seized to satisfy the judgment. Upon the day of sale, the defendant in the present action, Wilcox, at the request of Alston, and without the knowledge of plaintiff herein, directed the sheriff to forbear to sell, and, upon Alston paying a portion of the debt, restored to him the property seized. No further action was taken until four years afterward, when Wilcox sued out a *scire facias* to revive the judgment. Alston being then insolvent, execution was issued against the plaintiff, Cooper, as surety and co-defendant of Alston in the previous action. Under this execution, plaintiff was compelled to pay the balance of the above-mentioned judgment, and interest, and the costs of the *scire facias*. Plaintiff now prays that the money so paid may be restored.

Devereux, for the plaintiff.

Badger and B. F. Moore, contra.

GASTON, J. (after stating the facts). There is nothing in the relation of principal and surety between two persons directly liable to the creditor, which imposes on him the duty of active diligence against the principal debtor. Mere forbearance or delay in collecting from the principal debtor, furnishes no ground on which the surety can ask for exoneration. But if the creditor do any act for the ease of the principal, without the privity of the surety, by which act the surety is injured or exposed to injury, that act may be laid hold of for the surety's relief. One has not the right to be charitable at his neighbor's cost. The creditor stepping forward to relieve the principal, should remember the situation of the surety, and not extend this relief to his injury without his assent—unless he choose to release the surety. Accordingly, it is well settled, that if the creditor, from benevolence or favor to the principal debtor, relinquish a security which he has for the debt, or give up funds in his hands applicable to its payment, the surety will be exonerated to the extent of that

security or of those funds. Thus in *Mayhew v. Crickett*, 2 Swan, 191, it was holden to be clear, that if a creditor takes the goods of the principal debtor in execution, and afterwards withdraws that execution, he discharges the surety *pro tanto*. So in *Law v. East India Company*, 4 Ves. 829, it was considered as incontestable, that where a creditor has a fund of a principal debtor sufficient for the payment of the debt, and gives it back to the debtor, the surety can never afterwards be called upon. The creditor, by virtue of the seizure in execution, or of the deposit, becomes a trustee of the security so acquired, or of the fund for the benefit of all concerned, and is responsible to any party injured by unfaithfulness in execution of that trust. For it is a rule, that if he be not only creditor but trustee, then even his neglect, if it occasion the loss of that to the benefit of which the surety is entitled, will *pro tanto* discharge the surety: *Capel v. Butler*, 2 Sim & Stu. 457; 1 Cond. Eng. Ch. 543.

The application of the principle to this case seems obvious. After Wilcox had levied his execution on Alston's goods, these became a specific and full security for the payment of the debt, and this security, out of benevolence to Alston, he has relinquished, or at all events has by his act rendered ineffectual. In justice he must be regarded as having thus interfered with the collection of the debt at his peril, and not at the risk of those who neither consented to the course pursued, nor were consulted respecting it. The principle is spoken of as one of equity, but it prevails in all courts where the relation of principal and surety can be recognized. It is in truth but a consequence of the moral injunction so to exercise one's rights as not to injure others. Accordingly, where from the nature of the instrument it appears that one man is surety for the debt of another, if the obligee defeats the condition of the bond, the surety is discharged. So where there is acceptor and drawer, and the holder releases the former, the latter can not be held responsible. But the form of the security frequently puts it out of the power of any but a court of equity to apply the principle. Here there could be no relief at law, because by the form of the judgment rendered on the appeal bond, Alston and the plaintiffs were alike principal debtors. But in equity it was competent for the plaintiffs to show that they were sureties for Alston.

There must be a reference to inquire and report what moneys have been paid by the plaintiffs, and when and to whom paid, on account of their liability as the sureties of the defendant Alston, specifying how much was because of the debt and how much for

costs. Until the coming in of that report the court reserves the question whether the plaintiffs shall recover back any, and if any, what part of the costs incurred by them at law upon the *scire facias*. The court holds them clearly entitled to restitution of all they have paid for the debt and interest thereon, and to recover their costs in this suit.

By COURT. Decree accordingly.

ABANDONMENT OF LEVY ON GOODS OF PRINCIPAL operates as a release of surety if made without the consent of the latter: *Brown v. McDonald*, 29 Am. Dec. 112; mere forbearance, however prejudicial to the surety, will not discharge him: *United States v. Simpson*, 24 Id. 331; dismissal of a suit and release of attachment, sued out by the payee against the principal on a promissory note is not a discharge of the surety: *Bank of Montpelier v. Dixon*, 24 Id. 640; upon the question as to what degree of indulgence to the principal amounts to a discharge of the surety, see *Castan v. Dunlap*, 23 Id. 194, and note thereto which contains the different cases in this series upon the subject.

REVOKING A LEVY ON THE GOODS OF ONE OF TWO SURETIES does not release the other; as between themselves, they are principals, and the creditor may pursue either: *Whitchill v. Wilson*, 24 Am. Dec. 326.

Cited and approved in *Nelson v. Williams*, 2 Dev. & B. Eq. 118, to the point that where a judgment was obtained against a principal and surety, and an execution was, at the instance of the surety, levied upon lands of the principal sufficient to satisfy and discharge the judgment, the creditor could not, to the injury of the surety, discharge the levy so as to admit another debt of his own, and with much less reason could he assign the judgment to another person, to enable him, by discharging the levy, to satisfy a debt to the prejudice of the surety; cited also in *Green v. Crockett*, Id. 390, to the effect that sureties for the payment of the purchase-money of land sold under a decree in chancery, where the title is reserved until the purchase-money shall be paid, have a right, upon the insolvency of their principal, to file their bill to restrain the conveyance of the land, and to have it applied to their relief, although the principal had made an assignment of his interest in it to another, without notice, for the purpose of discharging a *bona fide* debt; the authority of the principal case is conceded in *Smith v. McLeod*, 3 Ired. Eq., as establishing the general rule, that whenever a collateral security on the property of the principal is given or obtained, it amounts to a specific appropriation of the effects so procured, to the discharge of the debt; and, therefore, the surety is entitled to the benefit of it as well as the creditor, and the creditor is under a duty to the surety, neither to willfully impair the security, nor to neglect to enforce satisfaction out of it; in *Carter v. Jones*, 5 Ired. Eq. 196, the principal case is adverted to in support of the proposition that delay merely, by the creditor, to sue the principal, is not equivalent to a discharge of the surety; affirmed also in *Hall v. Robinson*, 8 Ired. 56, upon the general rule above stated, that if the creditor deprives the surety of his debtor of any security, he discharges him *pro tanto*.

BUNTING v. RICKS.

[2 DEVEREUX AND BATTLE'S EQUITY, 130.]

CO-OPERATION OF A STRANGER WITH A TRUSTEE in an act amounting to a breach of the trust, will render him liable for the loss occasioned thereby, if he had such notice of the existence of the trust as was sufficient, ordinarily, to awaken distrust, or put him upon inquiry.

ACTUAL KNOWLEDGE OF THE EXISTENCE OF A TRUST IS NOT REQUIRED to render a person liable who acts together with a dishonest trustee, in a matter constituting a misapplication of the trust fund.

BREACH OF TRUST OCCASIONED BY MISAPPLICATION, by the clerk of a court, of the proceeds of a negotiable promissory note, held by him in trust, is sufficient to charge one who took the note in ignorance of the character in which it was retained by the officer, but was cognizant that it had been given to a commissioner, in payment, at a sale under his direction, in obedience to a decree of court.

SURETIES ON AN OFFICIAL BOND ARE ENTITLED TO ALL THE SECURITIES and remedies which could be taken advantage of at the instance of the creditors of the officer.

SURETIES ON AN OFFICIAL BOND MAY RECOVER from one who assisted in the commission of a breach of a trust imposed upon their principal in his official character, without any actual payment having been made to the *cestui que trust*, in satisfaction of his loss.

COUNTERCLAIM, IN ORDER TO CONSTITUTE A SET-OFF IN EQUITY, must be mutual, or it will not be allowed.

COUNTERDEMAND ARISING FROM A PAYMENT OF MONEY TO A PRINCIPAL, can not be set off against the sureties in an action brought by them, unless the plaintiffs are shown to be legally responsible for the sum paid.

BILL in equity. The cause was heard upon the bill and answer. In a suit pending at a previous day, in which Lewis was plaintiff, an interlocutory decree was entered, directing, that for the purposes of the suit, a certain chattel should be sold, and appointing Milton a commissioner to make the sale. The property was accordingly sold to Bunn, and the note of the purchaser and one Cooper, as surety, payable to the order of the commissioner, was accepted, in payment of the purchase price. The sale, as made, was subsequently approved by the court, and the note delivered to Whitfield, clerk, with directions to collect the money when it should fall due, and hold it, subject to the further order of the court. Whitfield, a few months later, applied to Ricks to discount the note. Ricks, suspecting that Whitfield was insolvent, declined at first to discount the note as desired, without the indorsement of Melton. Whitfield then applied to Melton to indorse the note, representing that it was necessary in order to enable him to bring suit, or receive the money on the note as he had been ordered. Melton indorsed

the note, entirely upon these representations, and without any other consideration. Whitfield then renewed his solicitations to Ricks to discount the note, and declared that he had purchased the note from Melton, and had given for it his bond with good security, upon which he would have to pay only the interest half yearly, while Lewis lived, and exhibited Melton's indorsement; which was regarded by Ricks as a confirmation of these statements. Ricks then discounted the note, the proceeds being applied as follows: the sum of two hundred and seventy dollars to the satisfaction of a debt to the defendant Ricks, for money received by Whitfield as clerk, of which the sum of one hundred and forty-seven dollars was received while the present plaintiff was surety of Whitfield on his official bond; and the further sum of two hundred and thirty dollars, in part satisfaction of a note, given to defendant Ricks by Whitfield, with the plaintiff Bunting and one Arrington as sureties: the balance in cash was paid to Whitfield. Whitfield absconded, and his official bond was put in suit against his sureties for the benefit of Lewis and the other parties to the original action, in the course of which the note had been received, as before stated, at a sale under the direction of a commissioner. Ricks began a suit, also, on the note, and recovered judgment against Bunn, the maker, and Cooper, surety, but refrained from levying, until it should be determined whether the suit of Lewis against the sureties on Whitfield's bond should succeed. The present bill was then filed by those sureties against Whitfield, Ricks, Melton, and Lewis, admitting that plaintiff was liable to Lewis, but insisting that there was a primary liability on the part of Ricks and Melton, as the wrongful holders and disposers of the fund belonging to Lewis, and that Lewis ought therefore to have recourse to them, or one of them. The prayer was, that the debt of Bunn and Cooper, parties to the note, should be declared to belong in this court to Lewis, and that the money if raised by Ricks, or if not raised, that the same might be collected, and applied to the satisfaction of the demand of Lewis, in exoneration of plaintiff. The answer of Ricks admitted that he knew the note had been given to Melton for the price of the property sold by him as commissioner, but averred that he did not know that it had ever been returned to court, or that Whitfield held it for collection.

Battle, for the plaintiffs.

The Attorney-general, for the defendant Ricks.

B. F. Moore, for the other defendants.

BURRIN, C. J. (after stating the case). Several matters are quite evident in this case, which, we think, are sufficient to authorize the relief of the plaintiffs. The debt which is the subject of the controversy justly and equitably belongs to the parties to the suit in the county court. The security for it was taken under the directions of the court, by an officer of that court, and the money was to be collected by another officer of the court, for the benefit of those parties. This latter person, instead of faithfully preserving the security thus intrusted to him officially, disposed of it for his own purposes. Now if Mr. Ricks admitted himself to have been aware that Mr. Whitfield was employing for his own use, that which had been confided to him for the use of others, it would be but enforcing a principle of common honesty to hold, that in discounting the note with that knowledge, and applying the proceeds as was done, he made himself accessory to, and responsible for, the breach of trust; he being one of the instruments in effecting it, and a partaker in the profit of it. Mr. Ricks could not hold what he knew his assignor could not in conscience convey to him.

But it is said that Ricks had not such knowledge, and did not intend a wrong to any one, but was himself deceived by statements and appearances that removed, and were sufficient to remove, from his mind every suspicion of an improper disposition of the note. If this were true, the owners of the note would have no cause of complaint against him, but have to submit to his gain by their loss. But it can not be yielded, that the circumstances were not sufficient to excite suspicion, or that there were any that could properly allay all suspicion. The circumstances, on which the argument of good faith is based in his answer, are, that the note was made payable to Melton or order; that it was indorsed by Melton to Whitfield, as in ordinary transactions, so that the legal title was in Whitfield; and that Whitfield moreover represented himself really to be the owner.

It is first to be remarked in respect to the form of the instrument or of its transfer, that it is not at all material to the present inquiry, except so far as it involves a presumption of the knowledge or ignorance of the continuing interest of the persons for whose benefit the note was taken. No doubt, to an entire stranger to the previous part of the transaction, the note, when taken by Ricks, would have presented the appearance of belonging wholly to Whitfield, and to have always belonged to him or Melton, exclusive of an interest in any other person. But those

appearances would have deluded only a stranger. One acquainted with the origin of the note would know that other persons besides Melton and Whitfield had been interested in the note, notwithstanding the inference to the contrary from the mere form of the paper; and therefore might—nay, must—reasonably conclude that interest continued, as there was nothing from them to extinguish it. This last is Mr. Ricks' situation instead of being that of the stranger. That he fully knew that Whitfield had cajoled Melton out of his indorsement, or that he may not have been lulled by that indorsement into false security, or that he was actually cognizant of Whitfield's dishonest misapplication of the note, can not be insisted on under the circumstances in which the cause is heard. The answer positively denies that Ricks actually knew or believed that the note did not belong to Whitfield, and affirms his belief at the time, from Melton's assignment and Whitfield's declarations that it did belong to the latter.

But much less than actual or particular knowledge in detail is sufficient to convert a person into a trustee, who co-operates with a dishonest trustee in an act amounting to a breach of trust. Constructive notice, from the possession of the means of knowledge, will have that effect, although the party were actually ignorant, but ignorant merely because he would not investigate. It is well settled, that if anything appears to a party calculated to attract attention or stimulate inquiry, the person is affected with knowledge of all that the inquiry would have disclosed. This principle we deem decisive of the present case.

To say nothing of Whitfield's known necessities and suspected insolvency, or his previous official defalcations, or the false appearance attempted by antedating the indorsement—and admit that Ricks believed his representation, singular as in some respects it was; yet there are other facts undeniably known to Ricks, which should have prevented such confidence in Whitfield, and which suggested inquiries in quarters where the whole truth must have been readily learned. Ricks knew why the sale was made; by what authority, and for whose benefit; and he knew that this was the note taken at that sale. From the nature of the sale, he must have known that Melton's duty was to report the transaction to the court and to dispose of the note according to the order of the court, and not without such order, or the directions at the least of the persons entitled to the money. Yet to not one of those sources did he apply for information, notwithstanding explanation was so obviously called for. He insists that he be-

lied Whitfield; and especially that he relied on the confirmation which Melton's assignment would naturally create. It is clear that Ricks did not at first believe Whitfield; for he required Melton's indorsement. When obtained, the answer seizes on it as constituting a formal legal authority in Whitfield to transfer the note, inasmuch as the note was payable to Melton or order, without a reference to his character in making the sale. But, at the same time, this defendant is obliged to admit that he was aware of that character and of the interest in the sale of the parties to the suit by petition. Then Melton's indorsement could satisfy Ricks of nothing, in respect of his authority from the court or those parties, to change the security for the debt by giving to Whitfield this note for his own. At most, that indorsement only carried the matter one step further back, and induced the suspicion that Melton, through design or ignorance, was committing a breach of duty. One who knew that, in its inception, the note belonged beneficially to the parties to the suit, could not justifiably rely on any indorsement, not even of him to whom the note was payable, without first ascertaining that those beneficial owners had parted from their interest, or that they or the court had given authority to the person thus disposing of what, at least at one time, was not in fact his, although it so appeared to be. Neither the court nor those parties ever did anything of the sort in this case; and so Ricks would have learned, had he applied to the record, or inquired of Melton, or either of the other parties. Had Mrs. Lewis, then, and the other persons who have the same title, claimed by their bill the debt as theirs in this court, there is no doubt that Ricks must have been considered as affected with notice of the rights of those parties; and that the court must have declared, that as the note was held by Melton and Whitfield, so it is held by Ricks, also, for their benefit.

Ought not the same relief to be given at the instance of the present plaintiffs, the sureties of an insolvent principal? We think so, upon the principle on which sureties ordinarily receive the assistance of this court. First, the creditors ought not to raise the money from the sureties, when the creditors can follow their original security specifically and effectually; and secondly, the sureties are entitled to the benefit of all the remedies and securities that were in the power of the creditors.

The creditors may certainly look to the clerk's sureties, if the note itself can not be recovered, or its proceeds subjected in the hands of the holder. We think it but reasonable, too, that the

creditors should have proceeded, in the first instance, on the clerk's bond. That was a plain and direct remedy, and, as stated in their answers, it was uncertain whether notice of their rights, either actual or constructive, would be confessed by Ricks, or otherwise established. In that state of things, the sureties could not impose on the creditors the delay, risk, and expense of an equity suit against Ricks. But the question is presented now in quite a different aspect. The sureties have themselves undertaken the task and expense of bringing Mr. Ricks to answer, and of establishing such knowledge by him at the time he took the note, as converts him into a trustee for the creditors, if they will look to him as such. They ought to do so and spare the sureties, because Ricks participated in the wrongful attempt to deprive them of their security, and thereby rendered himself directly answerable to them. Besides, the fund as the property of the claimants, ought to be taken, since it can be had, instead of leaving it in the hands of a person who, in the view of the court, did not come by it in good faith, for the sake of making the present plaintiffs responsible for it as lost.

But it is said the equity of the plaintiffs is repelled by the nature of their obligation, as they contracted to be responsible for the frauds and other malfeasances of the clerk, as well as for his nonfeasances. Admit it; but to whom are they to be responsible? To those who can complain of a violation of official duty, as an injury to them; but not to one who culpably aided or concurred in such breach of duty. The defendant Ricks can not therefore urge this objection. The other class of defendants, the creditors, ought not; because they have no interest either way; as they are to be paid at all events, and they can not but see that as between themselves and each of the other parties, that is to say, the plaintiffs in this court and Mr. Ricks, the former are innocent in this transaction, while the latter is quite the contrary. This is a sufficient reason why the creditors should take their remedy against Ricks; or if the present plaintiffs had paid the creditors, why the plaintiffs should not be re-imbursed out of the fund in the hands of Ricks, upon the principle of subrogation.

The answer of Ricks further claims, that he should be at least allowed to retain the sums which were applied to debts for which the plaintiffs or some of them were liable, as he says, upon other transactions. As to the portion that was applied to the bond in which Arrington and one of the plaintiffs, Bunting, were sureties, it is sufficient to say that it can not be allowed for

want of mutuality. The demand of the plaintiffs is joint, and can not be partitioned so as to allot a share to Bunting by way of satisfying the part of the bond for which he may be liable as between himself and his co-security, Arrington, who is not a party to this suit. The counterdemand of Mr. Ricks is in the nature of a set-off, and ought, therefore, to be between the same parties. The answer leaves us in the dark with respect to the nature of the other demand for one hundred and forty-seven dollars, said to have been paid into the clerk's office. It does not specify by whom paid; in what suit; whether on execution or voluntarily; or whether Ricks was the legal or equitable owner of it. In short, there are no allegations upon which it can be seen that the plaintiffs are legally responsible for that sum. If they be, Mr. Ricks can subject them in an action on the clerk's bond. We do him no injustice in declining to act here on the vague statement of his answer.

The result is, that the debt of Bunn and Cooper in the hands of Ricks must be declared subject to the satisfaction of the demand for which the plaintiffs were sued at law, and be brought into court, that it may be applied thereto, if the plaintiffs have not already satisfied the demand of the relators in the action at law, or be applied to the re-imbursement of the plaintiffs, if they have so satisfied the relators. The necessary inquiries will be made upon those points, and of the amount of the respective debts and recoveries. The defendant Melton must pay his own costs; and the plaintiffs must pay the costs of Mrs. Lewis and that class of defendants; but the defendant Ricks must repay to the plaintiffs the sum to be so paid by them, and also all the plaintiff's own costs both at law and in this court.

By COURT. Decree accordingly.

PURCHASER OF PROPERTY HELD IN TRUST is bound as a trustee, if, at the time, he has notice of the trust: *Kinloch v. O'On*, 26 Am. Dec. 196; *Maples v. Medlin*, 3 Id. 687; but it has been held that the *bona fide* purchaser of a legal title is not affected by a secret trust relating to it, unless he had direct, positive, and express notice of its existence: *Scott v. Gallagher*, 16 Id. 508; the note to the last case contains numerous citations of authorities upon this subject.

NOTICE OF A TRUST SUFFICIENT TO AFFECT A PURCHASER in good faith: See note to *Lodge v. Simonton*, 23 Am. Dec. 47.

SET-OFF IN EQUITY, WHAT CONSTITUTES: *People v. Common Pleas*, 23 Am. Dec. 495; *Chandler v. Drew*, 26 Id. 704, in the note to which the decisions reported in this series in respect to set-offs are collected.

SURETY MAY SUE BEFORE ACTUAL PAYMENT: *Miller v. Hovory*, 24 Am. Dec. 320; *Brentnal v. Helms*, 1 Id. 44 and note.

Cited and approved to the point that the sureties of a person are entitled to all the securities and remedies that could have been made available to the creditors of the principal, or the *cestuis que trust* in *Green v. Crockett*, 2 Dev. & B. Eq. 390; *Twiss v. Newbold*, 4 Jones' Eq. 212. And upon the point that whoever takes property affected by a trust, under circumstances, or with such knowledge of facts as would ordinarily awaken inquiry as to the existence of the trust, takes it subject to all the equities to which the beneficiary was entitled, the doctrine of the principal case is approved in *For v. Alexander*, 1 Ired. Eq. 340; *Exum v. Bowden*, 4 Id. 281; *Wilson v. Doster*, 7 Id. 221; but it was held in *Gray v. Armistead*, 6 Id. 74, citing the principal case, that a purchaser who had bought from an administrator a promissory note taken in payment at a sale of intestate's property, was not affected with notice of the breach of trust which was thereby occasioned, and could not be held liable at the suit of the sureties on the administrator's bond, who had been compelled to pay the amount of the note, on account of a fraudulent and wrongful misapplication having been made of the money received for it. It is said, in the opinion in that case, *obiter dictum*, however, that if the purchaser were privy to a misapplication of the price, or had received the note in payment of a debt due him, individually, from the administrator, or had actual notice, in any manner, that the administrator intended to commit a fraud, he would be held liable; and in *Wilson v. Doster*, 7 Id. 221, this is expressly decided; to the point that there must be a mutuality between the parties as to debts, in order to have them considered as equitable set-off, the principal case is cited and indorsed in *Elliot v. Pool*, 6 Jones' Ex. 42; *March v. Thomas*, 63 N. C. 87; referred to also in *Boyd v. Murray*, Phil. Eq. 238, as permanently establishing the rule, that when an officer misapplies a fund, the fund itself may be followed in a court of equity and subjected to the discharge of the demands to which it was properly applicable.

In the case of *State v. Arrington*, 3 Ired. 99, the question presented was whether the sureties, who were the plaintiffs in the principal case, were liable at the instance of certain wards of the defendant, for whose benefit, while they were minors, and the defendant in the principal case was acting as their guardian, a sum of money was paid into the clerk's office. In the course of the transaction, by which the promissory note was obtained by the defendant, out of which the principal case arose, a receipt in full for the amount in the clerk's hands due the infant wards of defendant Ricks, was given in part payment on the purchase of the note. It was held, citing the principal case, that the receipt of Ricks, defendant in the principal case, was no bar to an action, by the wards, who had since attained majority, on the official bond of the clerk, to recover the money due to them. The demand sued for and recovered in this instance was pleaded as a set-off in the principal case, but was not allowed as such, because the answer did not allege that plaintiffs were legally responsible for its payment.

CASES
IN THE
SUPREME COURT
OF
OHIO.

**PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK
OF CHILLICOTHE v. SWAYNE ET AL.**

[8 OHIO, 257.]

REPLICATION IS BAD if it neither traverses the plea nor states matters in avoidance.

CONTRACT RESERVING A RATE OF INTEREST higher than that allowed by law is not void; the obligee may recover the principal sum with the legal rate of interest.

CONTRACT BY A CORPORATION WHICH IS FORBIDDEN BY ITS CHARTER is void. **IF A CORPORATION CHARTER STATES** that it "shall not take more than at the rate of six *per centum* per annum on its loans or discounts," it has no capacity to loan money at a higher rate, and if a loan at a higher rate be effected by discounting a bill of exchange no recovery can be had thereon.

ASSUMPSIT on a bill of exchange. The opinion states the material facts.

T. Ewing and P. B. Wilcox, for the defendants.

Henry Stanberry, for the plaintiff.

By Court, HITCHCOCK, J. In considering this case, we are first to inquire whether the replications to the special pleas in bar are in law a sufficient answer to those pleas, and in order to settle this question, it is necessary to ascertain the substance of those pleas. Stripped of their verbiage they contain the charge that Paddleford, being in want of money, applied to the plaintiffs for a loan, and that an unlawful, usurious, and corrupt agreement was entered into between the plaintiffs and Paddleford, whereby they undertook to furnish him with the money by discounting a bill of exchange at and for a greater rate of inter-

est or discount than six per cent. per annum, in pursuance of which unlawful agreement the money was furnished, and the bill in controversy was discounted at a greater rate of interest than six per cent. per annum, which conduct of the plaintiffs it is claimed is in contravention of the general law of the land, and of their special law of incorporation.

In answering these pleas, the plaintiffs neither admit nor deny this agreement, or that it was carried into effect. They neither traverse the matters set out, nor do they confess and avoid. They merely assert that the bill of exchange was drawn "for a good and legal consideration, and not in pursuance of, or upon the said unlawful, corrupt, and usurious agreement, nor for the purposes" in the first and following pleas alleged. This so far is no answer to the pleas. There is no allegation in the pleas that the bill was not drawn for a good and legal consideration, or that it was drawn in pursuance of any unlawful or corrupt agreement. The charge is that after the bill was drawn, a "corrupt" agreement was entered into for its discount, and this is neither confessed nor denied by the replication. The replications next aver, that the plaintiffs "purchased the bill of exchange from the said drawers for a good and valuable consideration, to wit, for," etc., and close by tendering an issue to the country. There can be no doubt that each of the replications presents a variety of points, and is multifarious. Each attempts to put in issue matters which are immaterial. The matter introduced into each is new, and of course they should have concluded with a verification. Two replications, too, are in effect put into each plea, which is not allowable. For these reasons, as well as for others which might be stated, we hold the replications to be defective in point of form, and bad in special demurrer. The plaintiffs do not seem, however, to have placed much reliance upon their replications, as they have scarce made an effort to sustain them. The great question in the case is whether the facts set forth in the pleas constitute a defense to the action. This question has been argued by the counsel with much earnestness, and with great ingenuity. It is one of much importance, and is certainly not without its difficulties. We have examined it with care, and have been enabled to come to a conclusion without any difference of opinion.

The facts set forth in the plea show that the consideration passing from the plaintiffs, a banking company, for this bill of exchange, was a loan of money, and that this loan was effected at a rate of interest greater than six per cent. per annum. It

can make no difference that the contract received by the plaintiffs to secure the repayment of this money is a bill of exchange, and not a promissory note. If under the circumstances of this case a promissory note would be void, then this bill of exchange must be void.

It is contended by defendants' counsel that this contract is void, etc., being contrary to and against the statute law of the state regulating interest; and many authorities have been cited to sustain this position. Our statute regulating interest, provides "that all creditors shall be entitled to interest on all money after the same shall become due, either on bond, bill, or promissory note, or other instrument of writing, or contract for money or property, on all balances due on settlement between the parties thereto, or money withheld by unreasonable and vexatious delay of payment; and on all judgments obtained from the date thereof; and upon all decrees obtained in any court of chancery for the payment of money from the date specified in the said decree for the payment thereof; or if no day be specified, then from the day of the entering thereof, until such debt, money, or property is paid at the rate of six per cent. per annum, and no more:" 29 Ohio L. 451. This law fixes the rate of interest, but it does not affix a penalty if any person shall receive more than the rate thus fixed. It does not declare a contract for the payment of a greater rate void, although it does to my apprehension prohibit the taking of a greater rate. The authorities cited, some of them at least, show that in cases where statutes against usury do not annex any penalty, or do not declare usurious contracts void, courts having declared them void as against positive law.

We agree with counsel that contracts made against good morals, against public policy, and against positive law, are, as a general rule, void; and it is possible that if there had been no statute in Ohio previous to the one before recited, and we were now called upon for the first time to give that statute a construction, we might say that a contract reserving more than six per cent. interest on the principal sum loaned was void, as being contrary to that statute. But this is not the first time that this question has been before the court, and if the construction of any one of our statutes can be considered as settled by judicial decision and practice, it is this: 7 Ohio, 83.¹ We have held that a contract reserving interest at the rate of more than six per cent. per annum is not void, but that upon such contract a plaintiff may recover the principal sum, together with six per cent. interest.

1. *Lafayette Benefit Society v. Lewis.*

As, however, counsel seem so confident that this principle is not in accordance with the general rules of law, it may be well to look back and see what has been the course of legislation in the state upon this subject, and inquire whether the practice of the courts has been such as to carry into effect the legislative intention. The first law upon this subject within the territory now constituting the state of Ohio, was enacted by the territorial legislature and approved November 15, 1799. I say this was the first law upon the subject of interest. True, a law was published by the governor and judges on the fourteenth of July, 1795, declaring the common law of England, and all English statutes in aid of common law, passed prior to the fourth year of the reign of James I., to be in force in the territory: 1 Ch. O. L. 190. And if this law was adopted in conformity with the authority of the tribunal publishing it, then the English statutes upon the subject of interest and usury were in force here from 1795 to 1799. By the ordinance of 1787, the governor and judges of the north-western territory were authorized to adopt and publish "such laws of the original states" as might be necessary for the well-being of the territory. Beyond this their legislative power did not extend: *Id.* 67. And it might be difficult to maintain that under this authority they would have a right to adopt the English statutes in bulk, because those statutes had thus been adopted in one of the original states. The law of the fourteenth of July, 1799, before referred to, was adopted from Virginia: *Id.* 190. This, however, is a question of mere curiosity, and can be of no practical importance at this late period.

The territorial act of November 15, 1799, "regulating the interest of money," etc., fixed the rate of interest at six per cent. But it inflicted no penalty for reserving or taking a greater rate; it did not declare any contract made with that view void, nor did it create any forfeiture of the principal sum. The only forfeiture incurred under that act was the forfeiture of the entire interest. It was expressly provided that the lender might recover the principal sum loaned after deducting whatever payments had been made by way of interest: 1 Ch. O. L. 217. This statute recognized the principle that a contract might be "good in part and void in part." The provisions of this statute it is believed were novel, and they are certainly entirely at variance with the provisions of the English statutes and with the provisions of the pre-existing statutes of the "original states" upon the same subject. This difference may be accounted for in the

change of opinion upon the propriety of the prohibition of usury. At the time of the enactment of the statute of Henry VIII., and of the other English statutes, to demand or to receive usury (and all interest was considered usury) was deemed to be highly immoral, if not a deadly sin. Most of the statutes of the original states were copied from these English statutes, and enacted under the same state of feeling. This state of feeling, too, unquestionably influenced the courts in giving construction to those statutes. But in 1799, as well as since that period, it was and has been a mere question of policy, whether interest should be regulated by law, and to what extent.

This law of 1799 continued in force until the twenty-ninth of December, 1804, when it was repealed by another act upon the same subject. This act of 1804 fixes the rate of interest at six per cent. per annum, and provides that if any person shall demand or receive more than at this rate, "such person shall forfeit the whole amount of the debt, on which such illegal interest was charged or received," the one half to be paid into the county treasury and the other half to the informer or the person prosecuting. This statute is substantially if not literally the same with that of Pennsylvania upon the same subject, and was probably copied from the laws of that state. In the case of *Wycoff v. Langbrad*, 2 Dall. 92, decided in 1785, which was an action on a promissory note to which the defendants pleaded the act of assembly against usury, the supreme court of that state held "that when more than legal interest was included in any note, bond, or speciality, the whole amount could not be sued for and recovered; but the plaintiff was entitled in such case to a verdict for the just principal and lawful interest." The same doctrine is held in a more modern case: 12 Serg. & R. 46,¹ and this is considered as the settled rule in Pennsylvania.

Is it strange that when the legislature of Ohio passed a law substantially the same with that of Pennsylvania, that the courts of Ohio should put upon that law the same construction which had been put upon it by the courts of Pennsylvania? It would have been strange if they had done otherwise; especially when it is remembered that at that early period a great plurality if not majority of the citizens of Ohio, were emigrants from Pennsylvania, and had more frequent and easy intercourse with that state than with any other in the union. The courts of this state did put the same construction upon the statute of Ohio, and it is believed there was not, while the act of 1804 continued in

1. *Turner v. Calvert*.

force, a single case in which a contract for the payment of more than six per cent. interest, was held to be void. On the contrary, in such cases a plaintiff was allowed to recover "the just principal and lawful interest." If this was contrary to the legislative intention, would not the law have been changed? It was in reference to this course of practice that the court say, in *Smith v. Parsons*, 1 Ohio, 239 [13 Am. Dec. 608], in speaking of laws against usury, "should such a law enact, that a lender may receive from a borrower six per cent. interest and no more, and should an after contract contain an express promise to pay ten per cent., such a contract, although voluntarily made for the payment of a specific sum, would be void in part, and, in many of the states, the obligation of the contract would be entirely destroyed, and the obligor released from the payment of both principal and interest."

This law of 1804 continued in force twenty years, and was then repealed by the act of twenty-fourth of January, 1824, which has been already recited, and which continues still in force. The act of 1824 is the same with that of 1804, with the exception of the clause of forfeiture. And it would have been strange indeed if a court which held an usurious contract to be only void in part, under the law of 1804, which contemplated a forfeiture, should hold the whole contract void under the law of 1824, under which there can be no forfeiture. In truth, until the present case arose, the only controversy about the law of 1824 has been, whether it contained any prohibition of usury at all, it being insisted by many that it was only intended to fix the rate of interest, where the parties to a contract had not themselves fixed it; and that parties might contract for the payment of any rate of interest they might think proper, which contract would be enforced in the judicial tribunals of the country. This was not the construction put upon the law immediately after its enactment; but the same practice was adopted under it so far as the parties to a contract were concerned, as under the law of 1804. And such has been in this court, with but little variation, the uniform practice under it until the present time: 7 Ohio, 83.¹

From the foregoing remarks it will be seen, that from 1804 to the present period, there has been no time in which an individual might not recover the principal sum of money loaned, together with lawful interest, notwithstanding by the terms of the loan he was to have received a greater rate of interest.

But we are now urged to review former decisions, and to give

1. *Lafayette Benefit Society v. Lewis*.

such a construction to the interest law as will make all existing contracts, as well as all that may hereafter be entered into, for the payment of more than six per cent. interest, void. And what reason is urged why this should be done? Not that any injustice is done by the law as hitherto understood and construed; for it has been admitted in argument that the borrower of money at an usurious interest, although at law he might avoid the payment of the whole, yet in conscience would he be bound to repay the principal sum with lawful interest. Our law, then, only compels a man to perform that which in conscience he is bound to do. And of a construction which produces no other effect than this, there certainly ought to be no complaint.

It is argued, however, that upon similar laws the courts of Great Britain, and of some of our sister states, have decided differently. And it is supposed that those courts would have decided differently upon our own statute. It may be, and probably is so. I would at all times pay great deference to the decisions of the courts of England and of our sister states, but I would not change the construction of a statute which has prevailed for almost forty years, and which operates justly, because originally a different construction might have been put upon the same statute by a court of some other country. I would not do it even if I believed the original construction to have been wrong. For it would be far better to adhere to a construction thus long persevered in, and which confessedly contributed to abstract justice, but which was technically incorrect, than to make a change after so great a lapse of years. The statute regulating the rate of interest as construed by this court is now well understood. Contracts may have been made with reference to that construction, and which according to that construction are valid in part if not in whole. Adopt the construction contended for by the defendant's counsel, and the validity of these contracts would be impaired. Not, it is true, by a legislative enactment. That could not be done, it is prohibited by the constitution. But by a judicial decision of this court, reversing the whole current of its previous decisions upon the same subject for more than thirty years. If there be anything wrong in the law, it is within the legitimate province of the legislature to correct the evil. Not, it is true, so far as subsisting contracts are concerned, but so far as contracts hereafter may be made.

Upon the whole we entertain the opinion that the contract in the case under consideration, is not void as being against the general law of the state upon the subject of interest.

The next and more important question is whether this contract is void as having been made in violation of the act incorporating the bank of Chillicothe. That clause in the charter which is supposed to have been violated, is in the twentieth section of the act, and in the following words: "The said corporation shall not take more than at the rate of six per centum per annum, on its loans or discounts:" 3 Ch. O. L. 20, 29. It will be observed that the language here used is substantially the same with that used in the statute regulating interest. By this latter act, all creditors are entitled to interest "at the rate of six per cent. per annum and no more;" while in the act of incorporation, the phraseology is, "the said corporation shall not take more than at the rate of six per centum per annum," etc. And it is insisted by the plaintiff's counsel that inasmuch as this court hold that a contract between individuals for the payment of more than this rate of interest, is only void as to the excess over and above six per cent., that the same rule shall be applied in the construction of similar contracts made by this corporation. There is certainly much plausibility and no little force in the argument. But there is another question involved in construing a contract made by a corporation, and that is, the question of capacity of the corporation to make such contracts. There is a great difference between natural persons and corporations. Natural persons have capacity and power to make and enter into any contracts which are not prohibited by law, and will be bound by such contracts. In the absence of any law upon the subject of interest, such persons might legally make contracts for the payment of ten, fifteen, or twenty per cent. interest for the use of money, and at law such contracts must be enforced. Nor would there be any more impropriety in the conduct of a man who should demand an extravagant rate of interest, than in the conduct of him who should demand an extravagant price for his goods and chattels. He might be guilty of a violation of the laws of conscience, in taking advantage of the necessities of his neighbor, but would not be guilty of a violation of the laws of the land. True, if the terms of a contract were such as to shock the feelings, a court of equity might relieve against it, but at law, it would be obligatory. Still, although such are the principles which prevail with respect to natural persons, the contracts of infants and *femes-covert* are not in general binding upon them, but are void or voidable. There is a particular class of contracts, however, by which even infants will be bound, and these are contracts for

necessaries. Such are the general rules of law, relative to the contracts of natural persons.

But it is otherwise with corporations. A corporation is a body created by law, composed of individuals united under a common name, and having succession while it shall exist. It is the creature of the law, and derives all its powers and capacities from the law of its creation. "The modern doctrine is to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any other:" 2 Kent Com. 298, 2d ed.; 2 Cranch, 127;¹ 4 Wheat. 636;² 4 Pet. 152;³ 15 Johns. 358;⁴ 5 Conn. 560;⁵ 3 Pick. 232.⁶ As a corporation is created by law, it is proper that in all cases where it attempts to act it should show that by its charter of creation it has power so to act. For a corporation created for the purposes of constructing a railroad, or of acting as a library association, to carry on banking operations, and to claim to do it under its charter, would be absurd, unless the power so to do was expressly or by implication authorized in its charter. If an agent is restricted by the power received from his principal, if the legislature of the state can not transcend the powers delegated in the constitution, much less can a corporation go beyond the charter by which it exists. There is great propriety in holding corporations to the strictness of the law by which they were created, when it is considered that a charter granted to a private company is in the nature of a contract, and can not subsequently be revoked by the power which granted it, without a violation of the constitution of the United States, which is the supreme law of the land.

The president, directors, and company of the bank of Chillicothe, plaintiffs in this suit, were incorporated February 18, 1808. And by their act of incorporation, they are "made able and capable in law to have, receive, purchase, enjoy, and retain to them and their successors, lands, tenements, hereditaments, goods, chattels, and effects, of what kind, nature, or quality soever, and the same to sell, demise, grant, alien or dispose of; to sue and be sued," etc., and generally to do all acts it may to them appertain to do, subject, nevertheless, to the restriction and limitations, in the act subsequently prescribed and declared: 3 Ch. O. L. 20, 27. In the fifteenth section of the act it is declared

1. *Head v. Providence Insurance Co.*

2. *Beaty v. Knowler.*

3. *Trustees of Dartmouth College v. Woodward.*

4. *People v. Utica Ins. Co.*; 8 Am. Dec. 243.

5. *New York Firemen's Ins. Co. v. Ely*; 13 Am. Dec. 100.

6. *First Parish in Sutton v. Cole.*

"that the lands, tenements, and hereditaments, which it shall be lawful for said corporation to hold, shall be only such as shall be requisite for its accommodation in relation to the convenient transaction of its business; or such as shall have been *bona fide* mortgaged to it, by way of security, or conveyed to it in satisfaction of debts previously contracted in the course of its dealings; or purchased at sales upon judgments which shall have been obtained for such debts; and the said corporation shall not, directly or indirectly, deal or trade in buying or selling any goods, wares, or merchandise, or commodities whatever, except in selling the same when truly pledged to it by way of security for any debt due the said corporation; or purchasing the same at sales on judgments which shall have been obtained for any debts previously contracted in the course of its dealings." And the twentieth section is as follows: "That the said corporation shall not take more than at the rate of six per centum per annum on its loans or discounts." The continuance of this corporation is limited to the first day of January, 1818, but was afterwards extended to the first day of January, 1843, by the "act to incorporate certain banks therein named, and to extend the charters of existing incorporated banks," passed February 23, 1816: 2 Id. 913. And by this latter law, this bank, with others, was authorized to take interest at the rate of six per centum per annum, in advance upon its loans and discounts, and no more.

Taking this law in its several parts, it empowers this corporation to carry on banking operations, and to "do all acts it may appertain to them to do" as a banking company within the restrictions prescribed. It has power to hold land, but it shall be only such and so much as is necessary for its accommodation, relative to the convenient transaction of its business; or such as may have been mortgaged to it to secure, or conveyed to it in satisfaction of a debt, or such as shall have been purchased at sales upon judgments obtained for its debts. It has power to deal in goods, but it is only in selling such as have been truly pledged to it in security for any debt due, or purchasing the same at sales on judgments which shall have been obtained for debts previously contracted in the course of its dealings. It has power to loan money, or to discount bills or notes, but it can only be done at a rate of interest at or under six per centum per annum, in advance. Beyond this it has no more power or capacity to go, than it has to engage in any commercial or manufacturing transaction.

Suppose this corporation should enter into a contract for the purchase of a tract of land—not for its convenience, not for the payment of a debt to it due, but for the purposes of speculation—could it enforce such a contract? A natural person might enforce a similar contract, but this corporation could not, for the simple reason that for the purposes of such a contract it has no existence, it has no power, no capacity. The same would be the case with respect to a contract, relative to goods not within the terms of its charter. If it be true that contracts authorized by the charter, relative to lands or goods, are void, upon what principle shall we apply a different rule as to money contracts? This corporation has power to loan money, provided it loans it at a rate of interest not exceeding six per cent. interest per annum; but it has no power or capacity to loan money at a rate above and beyond this. And if a contract, as before stated, relative to lands or goods would be void, certainly the unauthorized, the forbidden contract with respect to money, must be. That such a contract is void is fully sustained by the opinion of the supreme court of the United States in the case of *The Bank of the United States v. Owens et al.*, 2 Pet. 527.

The pleadings in the case before the court show that here was a loan of money, and a contract for the repayment of the principal sum with interest, at a greater rate than that authorized by the plaintiff's act of incorporation. This loan was effected by the discount of the bill of exchange now in suit. This contract is void, not because the rate of interest is greater than the rate allowed by the general law of the land, but because it is such a contract as the plaintiffs had no capacity or power to make.

In the present state of pleadings, the plaintiffs have no title to recover, but on their motion leave is given them to amend.

The principal case is a leading one in Ohio, and has been cited by the courts of that state very frequently. Thus it was relied upon to show that the true rule for interpreting acts of incorporation is "to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for carrying into effect the powers expressly granted, and as not having any other:" *State v. Granville Alexandrian Society*, 11 Ohio, 12; *Miami Ex. Co. v. Clark*, 13 Id. 17; *Bartholomew v. Bentley*, 1 Ohio St. 41; *Straus v. Eagle Ins. Co.*, 5 Id. 61; *Vanatta v. State Bank*, 9 Id. 36. That when an obligation is tainted with usury it was void for want of power in the corporation to make it: *Bank of Wooster*, 1 Id. 235; *Preble County Bank v. Russell*, Id. 320; *Russell v. Fuslor*, Id. 329; *Union Bank v. Bell*, 14 Id. 209; *Hitchcock's Heirs v. U. S. Bank of Pa.*, 7 Ala. 434; *Evansville R. R. v. Evansville*, 15 Ind. 414; that laws conferring privileges and immunities on corporations must be strictly construed: *Matheny v. Golden*, 5 Id. 417. The principal case was also referred to with approval in *Creed v. Commercial Bank*, 11

Ohio, 492. It was declared to be inapplicable under the statute and facts before the court in *First National Bank of Columbus v. Garlinghouse*, 22 Ohio St. 502, and the statute there considered was adjudged not to annul a note for usury, but simply to forfeit all interest thereon. It has been cited beyond the state where it was rendered to show that a usurious contract may be void not merely because of the usury, but also because made by or with a corporation having no authority to make it: *English v. Smock*, 34 Ind. 132; that acts done by a national bank, or other corporation, "in violation of the law are utterly void:" *Wiley v. Starbuck*, 44 Id. 310; *Farmers' & T. Bank v. Harrison*, 57 Mo. 510; that the powers of corporations are wholly derived from statutes, and the exercise by a corporation of powers withheld by the legislature is void: *Clarke v. O. & S. W. R. R.*, 4 Neb. 466. In *Rock River Bank v. Sherwood*, 10 Wis. 237; *McLean v. The Lafayette Bank*, 3 McLean, 587; *Commercial Bank v. Nolan*, 7 How. (Miss.) 508, the principal case was not followed. On the contrary, it was asserted that the bank was not so without power to make the usurious contract as to render it void.

The powers of a corporation must be ascertained by reference to the legislative grant made in its favor. It can exercise no power other than those specially granted or which are incidental or necessary to the enjoyment of such powers: *State v. Mobile*, 30 Am. Dec. 564; *Pa., Del. & Md. Steam N. Co. v. Dandridge*, 29 Id. 543; *Leggett v. N. J. M. & B. Co.*, 23 Id. 728; *N. Y. F. Ins. Co. v. Ely*, 13 Id. 100 and note; *People v. Utica Ins. Co.*, 8 Id. 243.

POWER OF CORPORATIONS TO BORROW MONEY, as incidental to other powers expressly granted, is considered in *Bank of Chillicothe v. Chillicothe*, 30 Am. Dec. 185 and note 190.

CORPORATIONS MAY SUBMIT TO ARBITRATION any matter which they have the power to submit to litigation and the decision of the courts: *Note to Hutchins v. Johnson*, 3 Am. Dec. 630.

POWER OF CORPORATIONS to make conveyances and the manner in which the power may be exercised, are treated in *Leggett v. N. J. M. & B. Co.*, 23 Am. Dec. 728 and note 740.

VOTING BY PROXY IN CORPORATIONS and their power to regulate the same: See *Taylor v. Grinwald*, 27 Am. Dec. 33 and note 60.

USURY, WHEN AVAILABLE AS A DEFENSE: *Solomons v. Jones*, 5 Am. Dec. 538; *Wilkie v. Roosevelt*, 2 Id. 149 and note at 155; *Warren v. Crabtree*, 16 Id. 51; *Flemming v. Mulligan*, 13 Id. 707 and note. Equitable relief will not be granted against a usurious contract, except the complainant pay or tender the amount equitably due: *Morgan v. Schermerhorn*, 19 Id. 449.

LESSEE OF CITY OF CINCINNATI v. THE FIRST PRESBYTERIAN CHURCH.

[8 OHIO, 298.]

STATUTE OF LIMITATIONS DOES NOT RUN against the sovereign power, in the absence of express words to that effect.

MUNICIPAL CORPORATIONS are not exempt from the operation of the statute of limitations, when seeking to recover land dedicated to public use.

EJECTMENT to recover certain lands in Cincinnati. The proprietors of that city set apart certain lots by designating them

on a map of the city in red ink, and indorsing the words: "The town lots given for public use are numbered and painted with red ink." The lot in controversy was so designated, and, in 1790, a church was built upon it, and it was used for church and cemetery purposes from 1790 to the commencement of this action. The defendants relied upon the statute of limitations. The court instructed the jury that this statute did not apply against the claim by the city for land dedicated to public use. The defendants moved for a new trial.

Storer and Fox, for the motion.

Hammond, Worthington, and Wright, contra.

By Court, *LANE, J.* The principle, that the sovereign power of a state is not bound by statutes of limitation, without express words, obtained in the earliest stages of the common law, and has descended to this day. This rule is sometimes of odious application; but it is adopted as incidental to sovereignty, and necessary to preserve against negligence or cupidity, those rights which the state has acquired or retained.

This immunity, however, seems to be an attribute of sovereignty only. No case is found in the books, which exempts any other description of person, whether natural or artificial, from the operations of the laws; and none of the reasons for the exemption apply with much force to municipal corporations. The law imposes upon them the duty of defending the interests which they are created to hold, and has conferred every power necessary to this end. When the property is their own, the statute has been always held as binding; when their land or franchises are of public character, the public which they represent are principally members of their own body, sufficiently vigilant to watch their own interests, and sufficiently powerful to defend them. The rights of the corporation, therefore, seem well enough protected without invading the letter of the statute. And the very loose and indefinite character of some of these rights, renders the protection of the law peculiarly necessary for the security of occupants.

New trial granted without costs.

The general proposition asserted in the principal case, that a municipal corporation does not so partake of the elements of sovereignty as to entitle it to immunity from the statute of limitations, is perhaps consistent with reason as well as supported by authority: *Armstrong v. Dalton*, 4 Dev. 569; *Clements v. Anderson*, 46 Miss. 581; *St. Charles County v. Powell*, 22 Mo. 525; *Callaway County v. Nolley*, 31 Id. 393; *Abernathy v. Dennis*, 49 Id. 469; *School Directors v. Goerges*, 50 Id. 194; *City of Pella v. Scholte*, 24 Iowa, 283; *Evans v.*

Eric County, 66 Pa. St. 222. If the municipality should sue upon a contract, or for a tort, or to recover the possession of property vested in it as a private proprietor, there seems to be no reason why it should not be treated as a mere private corporation, and be defeated by the same pleas of limitation and prescription which would, under like circumstances, prove fatal to any private person or corporation. In the principal case, however, the lands sought to be recovered were part of those which had been dedicated to a public use. The court treated this circumstance as an immaterial one. Its judgment in this respect is in harmony with those of many other of our courts: *Galserton v. Menard*, 23 Tex. 349; *Callaway County v. Nolley*, 31 Mo. 393; *Rowan's Ex. v. Portland*, 8 B. Mon. 259; *Alves v. Town of Henderson*, 16 Id. 151; *City of Newport*, Id. 699; *City of Cincinnati v. Evans*, 5 Ohio St. 394; *Knight v. Heaton*, 22 Vt. 480; *Briel v. Natchez*, 48 Miss. 423.

It is obvious that the streets and highways of a city, and perhaps its public squares and other parts dedicated to public use, occupy a position not entirely similar to that of the property which the city holds in its own right as a private proprietor. In the first place, these streets and public squares are vested in the city for the use and benefit of its inhabitants; the former occupying the position and assuming the obligations of a trustee, while the position and rights of the latter are very analogous to those of a *cestui que trust*. In this circumstance alone there is nothing to prevent or impede the operation of the statute of limitations. Certainly the effect of this statute can not be avoided by vesting property in one person for the benefit of another. In such cases the trustee is vested with the legal cause of action to recover possession of the trust estate from an intruder, and can not protect himself from the result of the statute by showing that he held the title in trust for another. This circumstance of the title being held in trust for the public has, however, been referred to as material in several well-considered cases. It has been insisted that the title was held by the city, not for the purpose of alienation or of transfer by others; that as the city possessed no power to make a grant, none could be presumed from an adverse possession; and finally, that an encroachment upon, or an adverse holding of, a public highway, was at its inception, and during its continuance ever continued to be, a mere public nuisance, which no lapse of time could transform into a private right; and, therefore, that no right by adverse possession can be obtained to a public street, or any part thereof.

This subject has been considered more frequently and thoroughly in Pennsylvania than elsewhere. The first case was that of *Commonwealth v. McDonald*, decided in 1827 (16 Serg. & R. 390). The defendant was indicted for a nuisance in obstructing Water street in the city of Pittsburg. This street was proved to have been dedicated to the public, and to have been used as a public highway from the laying out of the town until some time between 1802 and 1805, when it was obstructed by a fence placed across it. After disposing of various other questions the court said: "There remains only to be considered the operation of time, as a bar to the prosecution of this public offense. As to the presumption of a grant, from a length of time, this would be a most unwarrantable presumption, a presumption contrary to all positive evidence in the cause; from whom could this grant be? The Penns could not, because they had dedicated it to public use; the city did not; the state did not. * * Who could convey this street? No one but the legislature. The court of quarter sessions could not vacate it under the general road law. To presume a grant, would be presumption run mad; it would be against the positive proof in the cause; whatever the defendant's grants are, he has shown, and they

exclude all presumption of others. All the cases of presumption have been for private nuisances and in civil actions; and there the presumption of a grant of an incorporeal right affecting the rights of another from length of time, may be rebutted by proof that the enjoyment was acquiesced in, not by the owner of the inheritance, but by one who possessed a temporary interest only; such as tenant for life or years, whose negligence or laches can not be allowed to prejudice the owner of the inheritance. How much less, then, ought the acquiescence of the neighbors in a public nuisance affect the public right? And this is the reason why no length of time will legalize a public nuisance, though it may afford an answer to an action of a private individual." But the court further proceeded to remark that there could be no right of prescription, in this case, because the street itself, as well as the obstruction thereto, was within the memory of man. The next case was that of *Barter v. Commonwealth*, 3 P. & W. 253, decided in 1831. It involved the right to maintain a well in a public street. Chief Justice Gibson, delivering the opinion of the court, said: "The title of the corporation to the soil, for uses that conduce to the public enjoyment and convenience, is paramount and exclusive; and no private occupancy for whatever time, and whether adverse or by permission, can vest a title inconsistent with it. The case of *Commonwealth v. McDonald*, by which this salutary principle has been conclusively established, is founded in the purest reason, and fortified by the strongest authorities."

The next case, in order of time, is *Rung v. Shoneberger*, 26 Am. Dec. 95. The peculiarity of this case is, that it involved a public square instead of a public street. The court, however, held this an immaterial difference, and that the erection of buildings upon a public square was a public nuisance which time can not convert into a private right. This last decision was followed in *Commonwealth v. Alburger*, 1 Whart. 469, involving a public square in Philadelphia, and also with *Price v. Plainfield*, 40 N. J. L. 608; *Hoadley v. San Francisco*, 50 Cal. 265. The later authorities in Pennsylvania accord with the earlier: *City of Phila. v. P. & R. R. Co.*, 58 Pa. St. 253; *Penny Pot Landing v. City of Phila.*, 16 Id. 79. The Pennsylvania rule is manifestly gaining ground and has been adopted in several states: *Mayor of Jersey City v. Morris Canal and Banking Co.*, 1 Beas. 561; *Burbank v. Fay*, 65 N. Y. 57; *Sims v. Chattanooga*, 2 Lea, 694; *Simmons v. Cornell*, 1 R. I. 519; *People v. Pope*, 53 Cal. 437. See also Dill. Mun. Corp., 3d ed., secs. 668-673.

The authority of the principal case is still recognized in Ohio: *Williams v. First Pres. Church*, 1 Ohio St. 510; *City of Cincinnati v. Evans*, 5 Id. 602; *Lane v. Kennedy*, 13 Id. 46. In the last case the court explained that the mere possession of a public highway, or of some part thereof, did not necessarily result in a prescriptive right to continue such possession, to the prejudice of the public; that to extinguish the public easement, it must appear that the possession was adverse, and not permissive merely, and the mere fact that an encroachment upon a highway was made and continued, does not show it was adverse when sufficient of the highway was left open for all the ordinary use of the public, and nothing was done which ought to have created any apprehension that the rights of the public were intended to be destroyed or impaired. This is manifestly in harmony with *Bartlett v. Bangor*, 67 Me. 460.

SUMNER v. HAMPSON ET AL.

[8 OHIO, 328.]

LIEN ON PARTNERSHIP PROPERTY FOR THE PAYMENT OF PARTNERSHIP LIABILITIES arises at its acquisition, both between the partners and in favor of their creditors.

LANDS MAY BE HELD IN PARTNERSHIP.

DOWER WILL NOT BE ALLOWED WIDOW OF DECEASED PARTNER in lands acquired as partnership property and required to pay the partnership liabilities.

BILL in equity for dower. The bill showed that the real estate had been acquired by Williamson & Hampson as partners, and paid for with their joint funds; that the complainant was Williamson's widow; and that the firm was deeply indebted, and that the proceeds of the realty will all be required to pay the debts of the firm. The bill was demurred to.

Brases, for the defendants.

Van Trump, for the complainant.

By Court, **LANE, J.** The point arising in the present case affords an example of the changes by which the law accommodates itself to the varying circumstances of the age. No distinction was made by the Roman law between real and personal estate; both were subject to the same condition of descent or other legal disposition. When feudal principles predominated, land, the reward of the soldier, or the means of organizing the military force of the government, was withdrawn in a great measure from the control of the occupant, or from liability to his debts, and held subject to the rule of descents only. The efforts of centuries have been directed to the emancipation of the realty from these restrictions, and its inviolability has been so impaired by subtle contrivances, by open or indirect attacks, by the wearing out of ancient usages, and by the adoption of new principles, that it may now be molded to most exigencies, and the dominion of the owner over it is nearly as complete as over chattels.

Wherever a proper partnership subsists, the partnership debts impose a lien upon the partnership property, both as between the partners themselves and the creditors and the partners or their representatives: 6 Ohio, 113.¹ This lien arises at the acquisition of the property, from the relation itself of partners, and is liable to be defeated by a *bona fide* sale only. If lands

1. *Grovesner v. Adm'rs of Austin*.

can be holden in partnership after the same rules as personalty, the right of the dower must be subordinate to this lien. For her estate is derived from her husband, and is subject to all incumbrances existing against it at the acquisition of his title: 1 Id. 542.¹ In the earlier stages of the common law, no proper partnership in lands could subsist; but as social arrangements became more complex, land was necessarily used in partnership purposes, firstly, as auxiliary to the general objects of the association, or received for debts, and more lately as direct capital stock. Numerous cases upon this subject are cited in the arguments. They show that the same rules which affect chattels, have gradually been extended to lands held for partnership purposes; that wherever partners manifest their intention to hold lands as partnership stock, either by express convention or by their course of dealing, it will be treated as such in all respects by courts of equity. If such be the law in England, and in the elder states, its policy is more imperative here, where real estate is so much the subject of traffic.

Demurrer sustained; bill dismissed without costs.

Cited in *Johns v. Johns*, 1 Ohio St. 357, to show that the modern doctrine is that there can be a partnership in lands, and that a widow is not entitled to dower in lands held in partnership.

PARTNERSHIP REAL ESTATE, the manner in which it is held, and the rights of the partners and their creditors with respect thereto: See *Baird v. Baird's Heirs*, 31 Am. Dec. 399; *Baca v. Ramos*, 29 Id. 463; *Hale v. Henarie*, 27 Id. 289 and note; *Yeatman v. Woods*, Id. 452 and note; *Mumford v. McKay*, 24 Id. 34; *Baker v. Wheeler*, Id. 66; *Greene v. Greene*, 13 Id. 642, and note at page 646.

MOORE v. ADAMS AND NEWKIRK.

[3 OHIO, 372.]

MENACES FOR WHICH ONE MAY AVOID HIS ACT OR DEED exist when he is put in fear of imprisonment, or mayhem, or loss of a member, or of his life.

DURESS OF IMPRISONMENT DOES NOT EXIST when the imprisonment or duress is tortious and unlawful.

DEED UPON AN UNLAWFUL CONSIDERATION WILL NOT BE VACATED; the parties stand *in pari delicto*, and will be left where the court finds them.

BILL to set aside a conveyance made by Moore to Adams. The bill stated that complainant, in May, 1831, prosecuted Adams for forgery; that the latter, through the skill of his attorney, was discharged on examination before a justice of the peace; that

1. *Greene v. Greene*, 13 Am. Dec. 642.

upon such discharge, Adams and his attorney threatened complainant with prosecution for perjury, and with an action for malicious prosecution; that an affidavit was prepared and a warrant issued, and complainant told that no delay would be tolerated, and that he had better settle the matter at once; that, though complainant was perfectly innocent, he thought the public might be prejudiced against him, and he therefore compromised with Adams, agreeing to pay him one hundred dollars; that he made the conveyance with the understanding that a reconveyance would be made on payment of the one hundred dollars, and upon the promise of Adams that nothing further should be done toward investigating the matter; and that notwithstanding such promise, complainant had been prosecuted for perjury for his evidence on the examination, but had been discharged; and that Newkirk had received a conveyance from Adams with notice of the facts. The facts alleged seem to have been substantially established or admitted.

Rawson, Smith, and Chapin, for the plaintiff.

No argument for the defendants.

By Court, Wood, J. The complainant seeks relief, because he was compelled by duress to make the deed to Adams. Is he right in this assumption? We incline to a different opinion. Lord Coke says that for menaces in four instances, a man may avoid his own act: 1. For fear of loss of life; 2. Of member; 3. Of mayhem; and 4. Of imprisonment: 2 Bac. Abr. 156, 157. The complainant was in no fear of life, or member, or mayhem; the mere threat of consequential imprisonment does not constitute duress. There must be actual and unlawful imprisonment to constitute duress, and the deed given as a consideration for the discharge. "It is not accounted duress of imprisonment, but when either the imprisonment or the duress that is offered, in prison, or at large, is tortuous and unlawful; for *executio juris, non habet injuriam*:" Id.

2. The complainant seeks relief because the consideration of his deed was, in part, the agreement not to prosecute him for perjury. We think this ground, also, unavailable for him. The agreement is unlawful, in which both parties are concerned, and they stand *in pari delicto*. It is *contra bonos mores*, and good policy requires the court to leave the parties as it finds them, and not corrupt itself by interfering between a corrupt vendee and an equally tainted vendor: 4 Ohio, 418;¹ 7 Id. 77;² 2 Kent Com.

1. *Ball v. Raguet*.

2. *Raguet v. Ball*.

366; 2 Stack. Ev. 87. These cases are all of executory contracts, it is true, but this court has determined that when a deed was delivered, upon an agreement analogous to the one set up in the bill, the contract was executed, and that the court would leave the parties to the full enjoyment of the fruit of their iniquity without interference. It is said, however, that that was an action at law, and this a case in equity. We know of no distinction in the application of these rules, in the one or the other court.

The bill is dismissed with costs.

A PARTY TO AN UNLAWFUL CONTRACT will not ordinarily be aided in any court of law or equity. "While the law will not enforce an executory contract (of this character) but leave the parties as it finds them in such case; so, neither will it aid the party who has performed such contract, by enabling him to recover back the amount he has paid, but the maxim, *volenti non fit injuria*, applies in all its force. There is, perhaps, no principle on which there is less conflict of authority from the earliest to the most modern reports:" *Spaulding v. Bank of Muskingum*, 12 Ohio, 548, citing the principal case.

DURESS, what is, and its effect, is the subject of the note to *Hatter v. Greenlee*. 26 Am. Dec. 374.

S. AND E. W. PERRY v. TORRENCE.

[8 OHIO, 521.]

STEAMBOATS MAY BE TAXED WHERE THE OWNER RESIDES, though they are navigated beyond the boundary of the state; and a statute requiring them to be so taxed does not conflict with the constitution of the United States nor the ordinance of 1787.

AGREED case, to determine the validity of a statute.

Wright, Hodges, and Walker, for the plaintiff.

H. Starr, for the defendant.

By Court, GRIMKE, J. This case comes before the court on the following agreed state of facts. The plaintiffs are owners of the steamboat *Adriatic*. They reside in Cincinnati, where the boat was built. She was enrolled first at Cincinnati, and afterwards at Louisville; and is one of the largest class of boats intended for and employed in the trade on the Mississippi; but touching occasionally at Cincinnati, to receive and discharge freight. The defendant is treasurer of Hamilton county. In 1835, a tax was levied upon this boat, and by agreement between the parties, paid without prejudice to the right of trying the legality of the tax. The tax was levied under the act of

1831. The first section declares that all stock or capital invested in steamboats shall be subject to taxation; and the sixth section, that all stocks or interest in steamboats shall be valued upon the statement of the owner under oath. It is admitted, that if this law is constitutional, the tax was legally collected, and that this action, which is brought for the recovery of it back, can not be maintained. It is contended: 1. That it is repugnant to the fundamental principles of taxation; 2. That it is repugnant to the constitution of the United States; and 3. That it is a violation of the ordinance of 1787.

The first objection we are not authorized to consider; it is addressed to the legislature, and not the courts. No state has ever been able to devise a perfectly just system of taxation. The laws which govern the distribution of wealth, are so imperfectly understood, that the greatest wisdom is, perhaps, unequal to the task. Moreover, the two classes of individuals, those who administer the practical affairs of society, and those who are masters of the science of political economy, dividing between themselves the actual amount of knowledge, the whole even of that knowledge can seldom be made to bear upon the interests of the community. It is one fundamental principle of taxation, however, that the property of all the citizens should be made to contribute as equally as possible to the public burdens; and the law under which this tax was levied, was probably framed for the purpose of attaining this great object. It imposes a general tax upon stock of every description. If it had exempted capital invested in steamboats, a disproportionate burden would have been imposed upon the class of citizens taxed. Similar laws exist in Connecticut, Massachusetts, and New York; only in the former state, it is provided, that if the boat is taxed in any other state, it shall thenceforth be relieved from the imposition there. If it is fit and proper, that all the citizens should be made to contribute, as nearly as possible, equally to the expenses of government, no rule more just can be adopted, than that which considers property of this description, as situated in the place where the proprietors reside. It is not on the technical principle, that the *situs* of personal property is there where the domicile of the owner is found; for that would embrace property which was exclusively and constantly employed in another state. It is because a boat which is navigated beyond the boundary of any one state, can not, in the nature of things, be considered as located, for the purposes of taxation, in any other place than that where the owners reside.

Is the law repugnant to the constitution of the United States? It must necessarily be difficult in a government so complex as ours, composed of one government within another; or, perhaps, more properly, of two jurisdictions standing side by side of each other, to prevent all interference of their respective powers. The wisdom of their contrivance consists in their touching each other in so many points, and the occasional inconvenience which this produces, is only the accidental result of the general genius of the system. Health laws, inspection laws, wreck laws, and harbor regulations, are only a few of those instances in which state legislation may appear to interfere with the acknowledged power of congress to regulate commerce; and yet these laws are universally conceded to be valid, because they act upon a subject-matter which is within the appropriate sphere of state legislation.

The laws for regulating the internal commerce of a state, those which have relation to the construction of roads and canals, constitute an immense portion of legislation, which is reserved to the states; and yet they may more or less interfere indirectly with even the exclusive power of congress to regulate commerce among the states. This occasional interference, which no human foresight could avoid, and which no human wisdom could altogether prevent, is even necessary to carry out the general designs of the government. It creates a salutary control upon the powers which are claimed and exercised by the two jurisdictions, and prevents either from indulging in an unlimited exertion of the authority confided to it. The laws of this state, which impose a tax upon the capital stock of merchants, and more particularly those which impose a duty on boats navigating the canals, necessarily affect its commerce with other states; and yet this has never been suggested as a reason why such laws are unconstitutional. If there is one class of powers which enters into the very definition of the authority to regulate commerce, there is also another, which is of the very essence of state legislation, and which can not be denied to the states, without impairing the very constitution, whose integrity is intended to be preserved. In the case of *Gibbons v. Ogden*, 9 Wheat.,¹ it was admitted that the taxing power was not a part of the power to regulate commerce. It had been ruled differently before; but in that case it was admitted that the two powers were substantive and distinct from each other; and that the states might have levied duties on imports and exports, if the constitution had

1. 9 Wheat. 1.

not contained a separate prohibition on the subject. And yet it is evident that there could be no more formidable interference with the power to regulate commerce, than the imposition of duties upon imports and exports.

But if this tax is not repugnant to the constitution on these grounds, does it infringe that clause which forbids a state from levying a tonnage duty? A tonnage duty is a duty upon a vessel without any reference to the place where her owner resides, without any regard to the jurisdiction, within which the capital invested is owned. It is then most manifestly a tax upon the boat as an instrument of navigation, and not a tax upon the property of citizens of the state. This distinction, I think, shows the reason why a power so general and indiscriminate as the imposition of a tonnage duty was withheld from the states; and it affords an equally good reason, why a tax, which confines itself exclusively to the property of our own citizens, can not be considered within the letter or spirit of the prohibition. The former power would interfere directly with the taxing power of other states; while the last would be the mere exercise of a power, which appropriately belongs to a single state. One great design of the federal constitution, so far as the intercourse among the states is concerned, was to prevent a conflict of their respective powers; and that great end is not infringed, but is carefully preserved by the express provision of our law, which restricts the tax to the property of citizens of our own state. The New England confederation, the assembly which met at Albany, and the convention of Annapolis, which led to the formation of the constitution of the United States, were all more or less designed to guard against the countervailing regulations of the different states. They were intended to prevent the encroachments of one state upon the legitimate powers of the others; and not to narrow the sphere of state legislation further than was absolutely necessary for that object.

In *McCulloch v. The Bank of the United States*, 4 Wheat.,¹ it was held, that it was not competent to a state to tax the franchises of the bank; but it was admitted, that a state might tax the stock of individuals living within the state, although it might be argued with great force, that this was doing, indirectly, what it was not permitted to do directly. But the rights of the states are themselves substantive and independent powers, which congress can neither usurp nor impair, merely because it is sometimes difficult to define the exact boundary which terminates those pow-

1. *McCulloch v. The State of Maryland*, 4 Wheat. 316.

ers. The repugnance of the power exercised in this case, to that clause of the constitution, which prohibits the states from levying a tonnage duty, is as little perceivable, as were the two apparently conflicting powers in the case of *McCulloch v. The Bank of the United States*. The two cases are, to be sure, *diverso intuitu*; but the analogy between them is not, for that reason, the less strong. It may be necessary in both, to make nice distinctions; but the making distinctions constitutes, if I may so express myself, the chief exercise of the human mind, in every department of knowledge, whether theoretical or practical. It is one of our privileges, and not one of our vices, that we can not always see our way clearly to the performance of great public duties, without much thought, attention, and study.

The late case of the *City of New York v. Miln*, 11 Pet. 102, in which was upheld the constitutionality of a law in New York, making it obligatory on all captains of vessels engaged in the foreign trade, to give bonds that the emigrants on board should not become a public charge, shows that there is as strong a disposition in that court, to maintain the just powers of the states, as there is to preserve unimpaired, the acknowledged powers of the general government. The states must not be regarded as mere municipal corporations. The happiness and welfare of the people are as much, if not more, wrapped up in their administration, than in that of the federal government, inasmuch as the sphere of legislation which is prescribed to them, comprehends a greater variety of vital interests. He was a wise man, Oliver Ellsworth, who in the convention which framed the constitution, declared that he did not want a splendid national government; he wanted a government which would give him domestic felicity. The saying showed that he thoroughly understood the great purpose for which government was created. The law of 1831 is not unconstitutional any more than would be a law which imposed a tax upon every barrel of flour or tobacco manufactured. Such a tax might be argued to be virtually a duty upon exports, because a large portion of the flour and tobacco would be actually exported. The toll exacted from canal boats, too, might be contended to be a tax upon goods imported from another state, because the owners of the goods paid the tax. There is no power in words, but there is power in just and correct distinctions. A tax upon land, is in one sense a tax upon exports, because it is certain that some portion of its produce will be exported. But it would not be a tax upon the privilege of exporting; neither the design of the law nor the form in

which it was clothed would authorize us to say so. There could be no visible bond of connection between the federal and the state governments, if their respective rights and interests did not lie in the near neighborhood of each other.

A third ground taken is, that the tax is repugnant to the fourth article of the ordinance of 1787, which declares that the navigable waters leading into the Mississippi shall be common highways and forever free. Even admitting that the article applies to citizens of this state, and not to citizens of other states, with regard to whom invidious distinctions might be made in the form of discriminating duties, if the power contemplated were permitted, yet this tax can not be regarded as a restraint upon the right of navigating those waters. The tax presupposes the right. Its efficacy, as a tax, results from the very liberty of exercising it, and could have no operation if the right were disturbed.

The conclusion on the whole is, that the tax complained of does not interfere with the power of congress to regulate commerce; nor can it be regarded as a tonnage duty, because that is a tax which is levied upon the vessel as an instrument of navigation, and without reference to the place where she is owned; nor is it a violation of the ordinance of 1787.

Approved and followed in *The Pomeroy Salt Co. v. Davis*, 21 Ohio St. 573, on the point "that steamboats owned by citizens of this state and employed in navigating waters within or bordering upon the state, were property subject, within the legislative discretion, to taxation in this state, although also used in other waters neither within nor bordering upon the state, and that it was subject to taxation in the place where the owners resided."

HICKOX v. CITY OF CLEVELAND.

[8 OHIO, 543.]

FOR WORK DONE BY A TOWN UNDER AUTHORITY OF A STATUTE, and in the performance of a public trust, no action for damages can be maintained. ASSESSMENT OF COMPENSATION MAY BE MADE BY COMMISSIONERS, for property taken for a public use. A trial by jury need not be required.

WHERE PROCEEDINGS FOR THE ASSESSMENT OF DAMAGES for property injured by grading a street are authorized, the party injured must resort to such proceedings, and can not sustain an action at law.

TRESPASS on the case; submitted on statement of facts.

Andrews and Foote, for the plaintiff.

H. B. Payne, for the defendants.

By Court, GEMKE, J. This action is brought for damage occasioned by grading Union lane and Water street, in the town of Cleveland. On the fifteenth of June, 1834, an order was made by the corporation, for grading certain streets, including the two above mentioned. The order was made in pursuance of a law passed February 18, 1834. Union lane was graded in pursuance of the order, in the year 1834. Water street was graded during the summer and fall of 1835, under an order for continuing the first-mentioned grade; and this order was made April 15, 1835. On the seventh of March, 1835, an act amendatory of the preceding act was passed by the legislature, appointing three persons therein named to appraise the damage which might occur to any persons from the prosecution of the work. On the fifth of September, 1835, a committee of three persons were appointed by the corporation by virtue of the fourth section of the last act, to appraise the damages caused by the grading. This committee was duly organized, and from about the twentieth of October, 1835, to the twenty-sixth of February, 1836, met regularly, to receive and determine claims for damages; at which last-mentioned time they made their returns to the corporation, having disposed of all claims before them; since which they have never convened.

It is admitted, that the plaintiff had notice of the time and place, when and where the committee met, and that he preferred a claim for the injury to his lot on Union lane, which was acted upon and disallowed by the committee. It is further admitted, that previous to the first of January, 1836, the plaintiff had notice of an act of the legislature passed in December, 1835, amendatory of the preceding act of March, 1835, and that he did not present any claim for damage to his property on Water street. It is also admitted, that the board of appraisers consisted of three persons, two of whom were citizens, and all freeholders of Cleveland, and that they generally made their appraisal upon view of the premises, without examining witnesses or hearing parties, excepting that the statements of parties were heard upon request.

In what respect, then, does the case differ from that of *Scovil v. Giddings*, 7 Ohio, 211? In none, except that the present action is brought against the corporation, and in the former it was against an agent. But this in reality presents a difference of fact, and not of principle: the corporation acted under the authority of an act of the legislature, and no action will lie for what they have done in the execution of that duty, unless they

exceeded the authority confided to them, or abused that authority by acting arbitrarily, or oppressively, in the mode of carrying it into execution.

In *Boulton v. Crowther*, 2 Barn. & Cress. 703, where, by a general turnpike act, the trustees of roads were authorized to divert, shorten, or improve them, it was held that no action could be maintained against them, for a consequential injury, resulting from an act which they were authorized to do. And this was only a ratification of the same principles which had been previously declared in *Sutton v. Clarke*, 6 Taunt. 34. There the defendants had a public trust to perform, and it was held that having acted *bona fide* and according to their best skill and diligence, in the exercise of a public function, although they had done an act which occasioned consequential injury to a citizen, they were not liable for such damage. The case of *Leader v. Moxton*, 3 Wils. 461, has been sometimes supposed to be inconsistent with these determinations. In *The Manufacturing Company v. Meredith*, 4 T. R. 790, Lord Kenyon says that he doubts the accuracy of the report of that case in Wilson. But, in reality, that case is not at all irreconcilable with any one of the subsequent determinations. It would seem from the report, that the defendants had been guilty of an abuse of the authority intrusted to them; they were, therefore, trespassers *ab initio*. The question therefore was rightfully determined, although the court may have been mistaken in the annunciation of the general principle. The case which I have just referred to, from 4 T. R., is itself a decisive authority against the present action.

The principle declared in these cases has been strengthened and confirmed by subsequent decisions in this country. In *Steele v. The Navigation Company*, 2 Johns. 286, the action as in this instance, was directly against the corporation, but, inasmuch as they acted under the authority of an act of the legislature, it was held that no action was maintainable against them. And in *Callender v. Marsh*, 1 Pick. 418, where a surveyor was authorized by statute to dig down a street, it was decided that if he acted within the scope of his authority, a party injured could not institute an action against him, nor against any other person employed by him. The power complained of in this instance is one which has been exercised in every civilized country. At Rome the general care of the highways was given to the *sediles*, who appointed agents for the superintendence of the roads without, and of the streets within the city. And one of the duties of these last was to level the streets. Where private property was

taken for public uses, the civil law allowed a compensation. The common law lawyers have always contended against this right. In this country, we have adopted the former rule, the state of South Carolina being the only one which I recollect, whose constitution does not guarantee the right to be compensated in such cases. Whether this case, however, comes within the provision of our constitution, I think, may well be doubted. Private property is not in reality appropriated to public uses; but by leveling the streets in Cleveland, a consequential injury only is sustained by individuals. It was in the power of the legislature, however, to award compensation; and they have made effectual provision for that purpose. The act of the eighteenth of February, 1834, gives the authority to grade Union and Water streets, and that of March 7, 1835, provides for the assessment of damages.

What just ground of complaint is there then? It is that the right to jury trial is not preserved. There is not a single state in the union, in which a case of this kind has been supposed to fall within the constitutional provision relating to trial by jury. From time immemorial, the practice of assessing damages, by commissioners variously appointed, has been in use in the United States. And yet, notwithstanding so many of them have revised and changed their constitutions, it has never been thought necessary to make the guaranty of jury trial more comprehensive in its meaning, than it was before supposed to be. There is a total inapplicability of the use of jury trial in such a case. It may as well be said, that a tax can not be collected without convening a jury, in the case of every individual, to determine whether it is rightfully levied. If it should not be, then an action would be maintainable; and so in this case, if the corporation had exceeded the authority intrusted to them, they would subject themselves to an action, and then, in both instances, jury trial would have its full application: 7 Ohio, 111.

It is evident, then, that this action can not be supported. Water street was graded in the summer and fall of 1835. The committee to assess were in session until February, 1836, and yet the plaintiff presented no claim for damages, probably because he did not approve the decision of the committee on his claim for damages on Union lane. The amendatory act of December 17, 1835, declares that those who shall omit to present their claims, shall be deemed to have waived them; in that mode, and as against the present defendants, there never existed a right of action.

Judgment for the defendant.

City is not liable to an action for damages for injuries resulting from grading a street, when the work is done under and pursuant to a statute which prescribes a form for assessing damages, by means of which compensation can be obtained: *Rhodes v. Cleveland*, 10 Ohio, 161; *Houston v. Hamilton & Erie R. R. Co.*, 4 Ohio St. 689; *City of Cincinnati v. Penny*, 21 Id. 505, all citing the principal case. But if the statute does not provide a mode by which plaintiff could have obtained compensation, then he may prosecute his common law action: *Foots v. City of Cincinnati*, 11 Ohio, 410.

MUNICIPAL CORPORATION MAY REGRADE A STREET whenever it deems "such improvement useful to the local public," and is not answerable to any private citizen for consequential injuries to his property resulting therefrom, the property itself not being dug down or destroyed, nor injured by draining or backing water thereon: *Keasy v. Louisville*, 29 Am. Dec. 395. It is, however, answerable for injuries resulting from the malicious acts of its officers and agents in digging up a street and thereby destroying and injuring property: *Goodloe v. City of Cincinnati*, 22 Id. 764. This case was determined upon the allegation in the complaint, that the act done was illegal and malicious. It is not, therefore, an authority when the proofs or pleadings show that walls are undermined or weakened, or property otherwise injured in regrading streets, or in prosecuting in good faith schemes entered into with intent to promote the welfare of the public.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

STOCKTON v. DEMUTH.

[7 WATTS, 39.]

DECLARATIONS OF AN AGENT WHILE ACTING AS SUCH and within the scope of his authority are evidence against his principal.

PARTY IS NOT BOUND BY THE TESTIMONY OF HIS OWN WITNESS so as to preclude him from proving that the facts were otherwise than as stated by the witness; but he can not, to attain this result, prove declarations of the witness differing from his testimony on the trial.

THE OBJECTION OF INCOMPETENCY AS A WITNESS IS WAIVED, where the party who might have made the objection, calls the witness in support of his own case.

CASE brought to recover the value of a package of goods said to have been forwarded from York to Baltimore by the stage line of Stockton and Stokes, defendants below. Mr. Erb, defendant's agent at York, was called by plaintiff, and was examined by him in support of his case. Mr. Erb testified among other things that Mr. Demuth had not delivered the package at the time that he paid the freight, an entry whereof was on the books, and that he did not remember any subsequent delivery prior to the departure of the stage on which the package was said to have been forwarded. Plaintiff also offered the deposition of John Walls to the introduction whereof in evidence, the objections were raised that appear in the opinion. Walls, in his deposition, testified that some two years previously Mr. Erb told him that he had forwarded by defendant's stage line to Baltimore, for Mr. Demuth, a package that had been lost, and that he desired him to look for it, which he did unsuccessfully. Defend-

ants called as a witness on their behalf Mr. Erb, whereupon plaintiffs objected because he was their special bail. Defendants contended that as plaintiff had previously made of Erb his own witness, that the objection was no longer open to him. The objection was sustained. Defendants having incorporated their several objections in bills of exceptions, brought them up now on writ of error.

Fisher, for the plaintiffs in error.

Mayer and Evans, contra.

By Court, SERGEANT, J. Two of the bills of exception in this case are now relied upon by the plaintiffs in error. The first is to the admission by the court below of the deposition of John Walls taken on behalf of the plaintiff below. The defendants objected to it as hearsay, being the declaration of the agent made after sending the parcel. It is well settled that the declarations made by a person's agent, whilst acting as such, and within the scope of his authority, are evidence against the principal: *Hannay v. Stewart*, 6 Watts, 487; *Clark v. Baker*, 2 Whart. 340. Erb himself had previously stated, in his examination in court, that he was the agent of the defendants on the twenty-ninth of July, 1834, and continued to be so until June, 1836. The declarations in question would seem to have been made shortly after the twenty-ninth of July, 1834, when the entry was made in the books, and related to the business of the stage company, in which Erb was then employed as agent. This objection, therefore, is not tenable.

Another objection to the deposition was, that the declarations went to contradict the previous statement by Erb in his examination. It seems to be a principle of law, that a party can not discredit the testimony of his own witness, or show his incompetency; for it would be unfair that he should have the benefit of the testimony, if favorable, and be able to reject it, if the contrary. When, however, a party is under the necessity of calling a witness for the purpose of satisfying the formal proof which the law requires, he is not precluded from calling other witnesses who may give contradictory testimony; as in the case of *Lowe v. Jolliffe*, 1 Bl. 365, where the subscribing witnesses to a will testified to the incapacity of the testator, yet the devisees were allowed to go into other evidence to support it. And even where a witness by surprise gives evidence against the party who calls him, that party will not be precluded from proving his case by other witnesses; for it would be contrary to justice that

the treachery of a witness should exclude a party from establishing the truth by the aid of other testimony. Accordingly, where a plaintiff had called the servant of the defendant to prove a warranty of a horse, on which the action was founded, and the witness denied that he warranted the horse, the plaintiff was allowed to prove the fact by means of other witnesses: 2 Camp. 556; 1 Stark. Ev. 185. According to these principles a party may resort to other evidence to prove his case, though denied by the witness first called to support it. It would seem, however, that he can not contradict his witness by adducing any act or declaration of the witness himself, of a contrary tenor; for when a witness, called for defendant to prove a partnership between him and the defendant, denied the fact, an answer made by the witness in chancery, in which he had stated the contrary, was not admissible, because its only effect could be to impeach the credibility of the witness, though it was competent to the defendant to prove the fact of partnership by other means: *Ewer v. Ambrose*, 3 Barn. & Cress. 746. The deposition of Walls would not be competent for the purpose of proving by Erb's declarations a fact which Erb in his previous testimony had denied, because it would go directly to impeach his veracity; but it would be admissible to establish a fact not stated by him. Erb, in his testimony, states that at the time of the entry in the book no package was brought to the office, and that he had no recollection of having sent it. His declarations, as contained in the deposition of Walls, are to the effect that he had sent the package, and that it had been lost. This evidence does not go to contradict what Erb had previously sworn to in his examination, or to discredit his testimony; they may be reconciled with what he had previously stated, and therefore must be considered as the proof of other facts by competent evidence, notwithstanding they consist of the act or declaration of the same witness who had been previously examined. The deposition of Walls was therefore properly received in evidence.

The other error relied upon is the rejection by the court of Erb, who was offered as a witness on behalf of the defendants, and objected to by the plaintiffs as interested, because he was special bail in the suit. The defendants contend that as Erb had been produced by the plaintiff as a witness, and sworn and examined generally in the cause, the plaintiff could not afterwards question his competency; and in this we think the defendants right. By calling him up and examining him generally as his

witness, the plaintiff accredited him as competent and credible, and was afterwards estopped from averring the contrary; just as a paper or deposition which the opposite party had given in evidence on a former trial, becomes evidence against him on a second trial: *Maclay v. Work*, 10 Serg. & R. 194; *Stiles v. Bradford*, 4 Rawle, 400. The distinction is between producing and swearing the witness generally, and on his *voir dire*. A party to a cause sworn on his *voir dire* to his book of original entries, can not be examined generally by the opposite party (without consent), but only to show it was not his book of original entries, or that the entries were not made at the time: *Shaw v. Levy*, 17 Serg. & R. 99. But it is otherwise when he is sworn in chief; and this very point was decided in *Jackson v. Varick*, 7 Cow. 239, where the defendants introduced a devisee to prove the execution of a bond to which his name appeared to be signed as a witness. He was sworn generally as a witness in the cause, and denied that he ever witnessed the bond. The plaintiffs' counsel insisted on cross-examining him in support of his right, to which the defendants objected on the ground of his interest as a devisee; but it was held, that having introduced him as a witness, they could not question either his competency or credibility. The court below, therefore, erred in rejecting Erb when offered by the defendants, and the judgment must be reversed.

Judgment reversed, and a *venire facias de novo* awarded.

THE DEPOSITION OF A WITNESS must be offered as a whole by the party who has had it taken; for he is estopped from denying the competency of any part of the evidence of his own witness: *Southwark Ins. Co. v. Knight*, 6 Whart. 330.

A party by calling upon a witness in support of his case, waives the objection of incompetency that he might otherwise have made, when that witness was called upon by the opposing party: *Turner v. Waterson*, 4 W. & S. 175, citing the principal case.

DECLARATIONS OF AN AGENT, where evidence against the principal: *Davis v. Whitesides*, 25 Am. Dec. 138 and note, where the prior decisions are collected.

JOHNSTON v. FESSLER.

[1 WATTS, 42.]

PARTY MUST ASSENT TO A PROPOSED CONTRACT at the time if he wishes to bind the other party.

AMENDMENTS TO PROCEEDINGS IN JUSTICES' COURTS should be allowed with great liberality.

THE case appears from the opinion.

Alexander, for the plaintiff.

Watts, contra.

By Court, ROGERS, J. The question on which the merits of this case must turn, arises on the third bill of exceptions, and the answer of the court as to the effect of the testimony. The plaintiff declares that, in consideration of delay, and the further consideration that he would accept, etc., the defendants as his debtors, and would discharge Duncan & Mahon, they assumed to pay the debt. If a creditor, at the request of a third person, forbear to sue his debtor for a certain time, it is a sufficient consideration to support a promise by such persons to pay the debt. But a mere forbearance, without request or agreement, will not render the person liable to an action. Here the alleged consideration of the contract is, that he would accept the defendants as the debtors and discharge Duncan & Mahon from the payment of the debt. The consideration must be proved as laid in the declaration; and the doubt is whether the plaintiff proved a contract by which the defendants were bound to pay the debt of Duncan & Mahon. The promise of Lyon, who represented the firm, was in the alternative. He said they were not able to give him the money then, but that they would give him iron, if he would take it; or they would pay him in money by the spring following. Here the defendants offered to do one of two things, and if Fessler had closed with either, the contract would have been concluded, but in order to render a contract certain and complete, it is indispensable that there should be the assent of both the contracting parties; or both are at liberty to recede from it. Fessler did not accede to the offer at the time, as is apparent from the testimony; on the contrary, he said, in answer to the defendant's proposition, that he would see if he could sell the iron; and if so he would take it. The other alternative would not seem ever to have been a matter of deliberation with him. For aught that appears, no further communication took place between them; and we are now left to conjecture whether Fessler agreed to accept of his debt in iron, or preferred waiting until spring, and receiving it in cash. The mere fact that he delayed commencing his suit until spring does not remove the difficulty, as his assent to the agreement was a prerequisite to the consummation of the contract. At the time of entering into the contract, the engagement was all on one side. The other party not being bound, it was *nudum pactum*, according to the principles decided in — *v. Ozley*, 3 T. R. 653.¹ We can not

1. *Cooke v. Ozley*.

see a shadow of proof from which the jury could draw the inference that Fessler agreed to accept Johnston & Co. as his debtors, instead of Duncan & Mahon. It is to be regretted that a contract to pay the debts of another may rest in parol; and such contracts should not be enforced on slight grounds.

This was a suit before the justice, substantially against John Johnston and Jacob B. Lyon, trading under the firm of John Johnston & Co. It was so understood by all the parties. Both the members of the firm had notice of the suit, and the appeal was entered for both by their common agent and manager. The suit is not, it is true, set out before the justice with technical precision, nor is this nicety required; but on the appeal, it is the duty of the court to put it into form, and of course there is no error in ordering the jury to be sworn according to the parties, as they are correctly stated on the record. If we were to hold justices of the peace to strict technical rules, it would greatly impair the usefulness of this tribunal; and for this reason we have been very liberal in the allowance of amendments, in all cases where the parties and the cause of action are the same as before the justice. There is nothing in the objection to the evidence contained in the second bill.

Judgment reversed, and a *venire de novo* awarded.

It was held in *Grenell v. Sharp*, 4 Whart. 344, that the rule mentioned in the principal case, that amendments should be allowed with great liberality in proceedings which have originated in the courts of justices, would not go so far as to allow of entirely new parties being brought into the action upon the trial of an appeal from a judgment in a justice's court.

In *Morse v. Bellows*, 28 Am. Dec. 372, it was held, in apparent contradiction of the principal case, that an assent to a proposed contract might be expressed within a reasonable time, the question of what is reasonable time being a question of law for the determination of the court. But an offer may be retracted at any time prior to its acceptance: *Esbridge v. Glover*, 26 Id. 344 and note 349.

HOFFMAN v. STROHECKER.

[7 WATK. 86.]

PURCHASER AT A SALE UNDER EXECUTION ISSUED ON A SATISFIED JUDGMENT, where nothing of record shows the satisfaction, will take a good or bad title accordingly as he had or had not actual notice of the satisfaction.

PURCHASER FOR A VALUABLE CONSIDERATION WITHOUT NOTICE, actual or legal, that the execution upon which his vendor's title depended was issued on a satisfied judgment, will not be affected by that fact.

PURCHASERS WITHOUT NOTICE ARE NOT ENTITLED TO PROTECTION, further than as they have actually paid the purchase money.

ENJOINTMENT. Both parties deraigned title from John Garber, sen., who died some time before the year 1819. At his death his son, John Garber, instituted proceedings in partition relative to the land in controversy, which eventually resulted in the land being set aside to him, in August, 1819, upon his entering into recognizances to the other heirs, of whom Susan Dean was one, to pay them their shares. In 1835 this land was sold on execution issued against said Garber, and was bought by plaintiff. In 1823 J. S. Hiester obtained a judgment against John Garber and David Garber, in their capacity of administrators of their father, John Garber, sen., for the sum of about two thousand two hundred dollars. This judgment was obtained on a joint and several bond executed by John Garber, sen., and John Strohecker. Writs of execution duly issued upon the judgment, and two tracts of land, of which that now in question was one, were sold thereunder. The first tract sold for six thousand nine hundred and ten dollars, which was more than sufficient to discharge the judgment debt and all specialty debts due by the estate. Upon the return of sale a motion was made to set aside the sale as to the tract now in question. The motion was eventually granted. At the time that the motion was granted the court awarded an *alias fieri facias* for the residue of the debt, interest, and costs. Soon after this award Mr. Hiester was paid the amount of his judgment from the funds realized on the sale of the first tract, whereupon he entered a satisfaction on a judgment which he had obtained on the same bond against John Strohecker. After his judgment was thus satisfied, Mr. Hiester was persuaded by John or David Garber to have issued an *alias fieri facias* in pursuance of the award, they insisting that there were other debts, and that this method of realizing funds would save them time and expense. The tract in dispute was levied upon under this writ, and was sold to John Strohecker. From John Strohecker this title passed to Peter Strohecker, the present defendant. There seems to have been evidence that Peter's bond for the purchase money to John Strohecker was never discharged, and that the transfer to him was but part of a family agreement. The charge to the jury appears in the opinion. Verdict for defendant.

Hoffman and Greenough, for the plaintiff.

Smith, contra.

By Court, ROGERS, J. This case was put entirely on the special award of the *fieri facias*. The court charged the jury

that the award of the *alias fieri facias* legalizes it, and that for that reason it will support the sheriff's sale in the lands of the defendants, who purchased on the faith of the order. It is unnecessary to decide on the propriety of the abstract proposition, as to the person who procured the award, and was perfectly aware of all the facts, as this case does not call for the decision of the point. The seventh of April, 1823, the court granted a rule to show cause why a former sale, made on Hiester's judgment, should not be set aside. This rule, on the twelfth of April, 1823, was made absolute; the levy and inquisition set aside; and an *alias fieri facias* was awarded for the residue of the debt, interest, and costs. It is impossible now to ascertain the ground on which this writ was awarded, notwithstanding there was money in court amply sufficient to pay the amount of the judgment. We are, however, bound to suppose that everything was rightly done unless there is proof of unfair dealing on the part of those interested in the estate, or who undertook the management of it. At the time the court made the order, the money was not in fact paid to Hiester, although there was some reason to say it was paid by operation of law. But whether Hiester would be entitled to the whole amount of his debt, out of the proceeds of sale, would depend upon circumstances; as, for instance, whether the money raised was sufficient, not only to pay the amount of the judgment, but also debts against the intestate of equal grade. It must be remembered, that Hiester's judgment was had after Garber's death, and, of course, he would be entitled to no more than a ratable share of the proceeds of sale. For this reason, the court admitted testimony to show that there were other bond debts which were entitled to a share of the proceeds. The plaintiff was not injured by the testimony, although it is difficult to see upon what ground debts of an inferior degree were admitted. But these points are immaterial, as we understand the testimony; for, two days after the decree of the court, on the fourteenth of April, the sheriff, who in the mean time had received the money arising from the sale, paid to Hiester the whole amount of his judgment, and, on the same day, satisfaction was entered on the judgment against John Strohecker, who was the co-obligor on the bond on which the judgments against Strohecker and Garber's estate were had. Hiester, who was properly admitted as a witness, testifies that after the money had been paid to him, the sheriff and one of the Garbers called on him to issue another execution. After some objection, he was prevailed on to give a *præcipe* for an *alias fieri*

facias, which was issued in pursuance thereof, to August term, 1823. From the testimony of Hiester, it appears that the money was paid after the award of the court; and satisfaction was entered on the judgment against Strohecker before the *alias fieri facias* was issued, on a *præcipe* given for it. Did, then, the purchaser, John Strohecker, acquire title under the sheriff's sale? And on this point we can not permit ourselves to doubt. When a vendee is guilty of actual fraud in procuring a title to land, no title passes to him, whether the sale be private or judicial. So, when one enables himself to become a purchaser by the commission of a fraud, no title is vested in him by the sheriff's deed: *Gilbert v. Hoffman*, 2 Watts, 66 [26 Am. Dec. 103]; *McKennan v. Pry*, 6 Id. 187. A justice who issues a second execution, after the first is satisfied, is a trespasser: *Lewis v. Palmer*, 6 Wend. 367. A sale of the property of the defendant, by virtue of a judgment and execution which is satisfied, the purchaser having full knowledge of the fact, would, it seems, be a nullity, although the defendant assented to the proceeding: *Jackson v. Anderson*, 4 Id. 475. And in *Swan v. Saddleman and Wood*,¹ 8 Id. 677, it is ruled that an execution upon a judgment, which has been paid and satisfied, is absolutely void, and not merely voidable, and a purchaser under such execution acquires no title. If it is intended to say that a purchaser, without notice, acquires no title, I should adopt the principle with great hesitation, and should be much inclined to doubt the policy of establishing such a rule. It would not be for the plaintiff and defendant, under such circumstances, to complain, as the injury would result from their own fraud or negligence, in not causing satisfaction to be entered on the judgment. It would be imposing upon a purchaser at sheriff's sale the necessity of ascertaining whether the debt had been paid. He has a right to purchase on the faith of the records of the court, which import verity.

If the defendant is not a purchaser for a valuable consideration, he would be in no better situation than his father, under whose grant he holds. But if he was a purchaser for a valuable consideration, which has been paid without notice that the debt was paid, the law would protect him as an innocent purchaser. And so the court instructed the jury, and further, as we think, correctly, that the record did not furnish such a state of facts as would affect him with notice. Although a sale of land by an executor in pursuance of powers contained in a will, may be fraudulent and void as respects the purchaser, because of his

1. *Swan v. Saddleman*.

having been a party to the fraud, yet, as respects a subsequent and innocent purchaser from him, the title is good: *Price v. Junkin*, 4 Watts, 85 [28 Am. Dec. 685]. And in *Fillerman v. Murphy*,¹ 4 Watts, 424, it was held, that where there was a sheriff's sale of an intestate's land, upon a judgment fraudulently obtained, to the attorney who obtained it, it is void as to the owners; but if it has been subsequently conveyed to an innocent purchaser, he is not affected by the fraud, and will have a good title. We have always been anxious to protect titles which depend upon the record. They are the muniments of titles on which purchasers depend, and they are not bound to look beyond them to discover any latent frauds, of which they have no notice, and to which there is nothing to direct their attention. They can only be affected by notice, either actual or legal. There is nothing on this record which would lead the purchaser, the defendant, to a knowledge of the transaction, for it does not appear on the record that there was any connection between the judgment obtained against the administrator of Garber and John Strohecker. That the purchaser at the sheriff's sale had notice, both actual and legal, does not admit of doubt; but that the defendant had, depends on all the circumstances of the case, of which the jury must judge. But was the defendant a *bona fide* purchaser? If he had notice of the fraud, he was not, nor is he protected if the purchase money be unpaid. In the *Union Canal Company v. Young et al.*,² it was held, that purchasers without notice are not entitled to protection, further than as they have actually paid the purchase money. No gift nor family arrangement will entitle the defendant to hold the property against the claim of the plaintiff. For unless the claimants in interest agreed to the sale, with a knowledge of all the facts, the agreement of the other heirs can not affect the question. The recognizance of Susan Dean was a lien on John Garber's land, and this lien can not be disturbed by any arrangements which he and the other heirs may think proper to make.

Judgment reversed, and a *venire de novo* awarded.

EXECUTION DEFENDANT IS NOT BOUND BY THE SHERIFF'S DEED OF HIS LAND, if there has been unfairness or fraud practiced towards him by the purchaser: *Shields v. Millenberger*, 14 Pa. St. 79; *Beegle v. Wentz*, 55 Id. 374; to the same effect see dissenting opinion of Houston, J.: *Bradlee v. Brownfeld*, 2 W. & S. 291; but mere irregularities in the sale are cured by the approval of the sale by the court: *Shields v. Millenberger*, *supra*. Where the invalidity of a judgment appears from the record, the judgment will not operate as a protection for persons deriving title under a sale upon execution issued on the

1. *Fillerman v. Murphy*; 8 C., 28 Am. Dec. 729. 2. 1 Whart. 410; 3 C., 30 Am. Dec. 212.

judgment. Thus a bond and warrant of attorney to confess judgment, executed by a married woman, being void, the coverture of the woman appearing from the record, a purchaser under the execution issued on the judgment is not protected: *Caldwell v. Walters*, 18 Pa. St. 85.

The principal case came again before the court in 9 Watts, 183, but the questions then involved were different from those determined above.

PURCHASER UNDER A SATISFIED JUDGMENT, the satisfaction not appearing of record, will take a good title though informed by the judgment debtor prior to the payment of the purchase money that the sale was void: *Doe v. Snyder*, ante, 311.

CLARK v. SEIRER.

[7 WATTS, 107.]

EQUITY WILL NOT ATTEMPT TO COMPEL A HUSBAND specifically to perform his contract made with reference to his wife's property.

SPECIFIC PERFORMANCE OF A HUSBAND'S CONTRACT to transfer the entire interest in lands, as well his own interest as his wife's right of dower, can not be sought in so far as it relates to a transfer of his interest while at the same time an abatement is demanded from the contract price proportionate to the value of the right of dower. In such cases if performance is desired of the husband's contract with reference to his own right, the entire contract price must be tendered.

EJECTMENT. The action was founded upon a written agreement between Clark and Seirer, whereby Clark agreed to convey to Seirer the tract in controversy, by the first of April, 1835, free from all incumbrances, other than a charge of maintenance of Clark's mother, with which the land was burdened. Seirer upon his part agreed to pay one thousand six hundred dollars for the land, eight hundred dollars on the first of April, 1835, and eight hundred dollars in five equal annual installments on each subsequent first of April. He also agreed to furnish the tenant in possession with seed grain, for which he was to receive the share of the crop due Clark under his agreement with said tenant. Before the first of April, 1835, Clark's mother died, whereby the land being released from the charge of her maintenance became more valuable. On the first of April, 1835, Seirer tendered the amount due under the agreement, and demanded a conveyance of the title he had stipulated for. Clark now refused to perform his contract, and his wife also declared that she would not execute a deed for the land. Seirer thereupon brought this action and paid the purchase money into court, to be paid over to defendant upon his obtaining a judgment. The jury was instructed, among other things, that if, after a recovery in this ejectment, Clark's wife still refused to join her

husband in a deed of conveyance of the land, her refusal to do so would constitute a valid defense to Seirer, to the value of the right of dower, in the case of any subsequent suits brought against him by Clark, to recover the unpaid installments of the purchase money. Plaintiff had a verdict.

Biddle and Alexander, for the plaintiff in error.

Hepburn and Watts, contra.

By Court, GIBSON, C. J. It seems to be at last settled on principles of policy and humanity, that equity stirs not to enforce a contract which involves in it a wife's volition in regard to her property; and it seems strange to us now, that courts of chancery should ever have hesitated about it. Contrary to the benign spirit of the common law, the avowed purpose of process of contempt against the husband is to extort a conveyance from her affection or fear. It would be a mockery to tell her she is free to act at her pleasure while the machinery of a court is put in motion to constrain her by the strongest sympathies of her nature. The disposition evinced by chancellors, in other cases, to set married women free from restraints imposed for their protection, and to hold them to the consequences of their acts performed notoriously under the influence or coercion of their husbands, is one of those things in respect to which, the superior wisdom and fitness of the common law is vindicated by experience. I would not, were it practicable to avoid it, expose the husband to imprisonment for a breach of the contract, even by an action; a fear of which, doubtless, serves to loosen the wife's hold on the property. But it is clear the contract will not be decreed on terms that would jeopard his liberty. On the other hand, if the vendee consent to take such title as the husband can give him, it is agreed the coverture will not stand in the way of performance. But thus far entitling himself to it by performance of his own part, he must professedly go for no more. If he tender the price, demanding an entire execution of the contract, it may be rejected for having been tendered on a condition he is not entitled to enforce.

Whether he may have an abatement of the price in compensation of the risk of dower left outstanding, is a question of the first impression; for the practice of giving specific execution without the wife's concurrence, is but lately sanctioned; yet there are analogies which seem to show he may not. The doctrine of compensation has doubtless been carried very far; so far, indeed, as to compel the execution of a contract which the party

had never made nor dreamt of. This was considered, in *Drewe v. Hanson*, 6 Ves. 675, to have been done, in the subdued tone of Lord Eldon, by "the exercise of a strong power;" in plain terms, an arbitrary one. The cases on this head have been those of mistaken description affecting a part of the estate or title; there is an admitted difference, in respect to it, betwixt a vendor and a vendee; for the latter may insist on having the part to which title can be made, though the former could not have compelled him to accept it: *Attorney-general v. Day*, 1 Ves. 224, sometimes misquoted as *Attorney-general v. Gowen*. On what, then, can this difference depend, but on the waiver of the vendee, who may forego something to which he is entitled, and accept less than what he is entitled to by the contract? The difficulty is to understand how he foregoes anything when he accepts a part and exacts an equivalent for the rest. We attach to the word waiver the idea of abandonment; but where there is an equivalent, we are unable to get away from the notion that there has been a change of terms, or the substitution of one contract for another. No idea of waiver is entertained where the vendee is the respondent; for it is perceived at once, that having no choice but to take a defective title, he must be compensated or defrauded.

The ground on which equity proceeds, at the prayer of the vendor, is well shown by *Stoddard v. Smith*, 5 Binn. 355, where it was determined that the contract is not dissolved by a failure in part, which leaves the object of it untouched; and that the vendee may claim an allowance for it in the purchase money. The vendor succeeded in procuring an enforcement of the contract, and the vendee would have been grossly wronged had he been forced to pay the entire price. Being defenseless at law, it was not at his option to take the property or refuse it; so that nothing could be done for him but compensate the loss by a correspondent abatement, and nothing less would have appeased the demands of justice. There have indeed been cases in which a vendee complainant has been placed in the predicament of a respondent, and relieved for the same reason; for instance, *Bolingbroke's case*, stated in a note in 1 Sch. & Lef. 19, in which the vendee had incurred expense on the faith of the contract, from which he was unable to extricate himself; and he also had an abatement on the principle of necessity. But other considerations press upon the mind, when an untrammelled vendee comes before a chancellor for an exertion of his extraordinary power; an exertion grantable of grace, and not due of

right, to control the vendor's legal right to affirm the contract by performing it, or to disaffirm it by responding in damages on it; and this, too, on his own conditions. He insists that the vendor be driven to his securities for the purchase money, not as they were originally framed, but as he would have them, were the bargain to be made over again; in other words, he comes to the chancellor to reform the contract, not to execute the practicable parts of it. I am unable to see the justice of that. If compensation be his aim, his remedy is an action for damages; nor, consistently with the principle that a man shall not affirm in part and disaffirm in part, do I see how he can have both performance and compensation. It was the opinion of Mr. Justice Livingston, in *Hepburn v. Auld*, 5 Cranch, 279, that chancery can not, in any case, compel specific performance on terms and conditions; or execute a contract in part and assess damages for the residue; in which, however, he undoubtedly went too far. Still, I say, in the words of Lord Eldon, in *Emery v. Wase*, 8 Ves. 515, when imputing the doctrine of compelling a husband to compel his wife: "If the cases have determined this question so that no consideration of the absurdity that may arise, and the almost ridiculous state in which this court must, in many instances, be placed, can prevail against their authority, it must be so." And here I concede, in the broadest terms, that it is fixed by a train of decisions which I need not specify, that even a vendee may enforce the contract in part, and extort compensation for a mistaken description by which he was deceived. But there is this redeeming qualification in the principle, that it gives not compensation for a defect which was obvious to the senses, or one of which the vendee was in fact apprised. Thus where a farm was described as lying within a ring fence, though it was in truth intersected by other lands, but of which the purchaser was informed, compensation was denied him, on the ground that he must be taken to have made his own estimate of the defect in settling the price: *Dyer v. Hargrave*, 10 Id. 506.

Now what is the character of a purchase from a husband of his wife's dower or estate? "The policy of the law," said the same profound jurist in *Emery v. Wase*, "is that a wife is not to part with her property but by her own spontaneous and free will. If this was perfectly *res integra*, I should hesitate long, before I would say the husband is to be understood to have gained her consent, and that the presumption is to be made that he obtained it before the bargain, to avoid all the fraud that might afterwards have been practiced to procure it. I would have

hesitated long in following up that presumption, rather than the principle of the policy of the law; for if a man chooses to contract for the estate of a married woman or an estate subject to dower, he knows the property is hers altogether, or to a given extent. The purchaser is bound to regard the policy of the law; and what right has he to complain, if she, who, according to law, can part with her property but by her own free will, expressed at the time of that act of record, takes advantage of the *locus penitentiae*; and why is he not to take his chance of damages against the husband?" Now when the object of an agreement is such as this has been declared, so inconsistent with political morality that a chancellor will not enforce, it is difficult to see anything in it to induce him to compensate the loss of it, or to touch it at all. If, in disregard of public policy, a purchaser has taken a covenant for a wife's title, let him, in the words of Lord Eldon, take his chance of damages for it; a chancellor should not move a finger for him; and if he has taken no covenant, is it not clear that he consented to take the husband's conveyance, without even a chance of damages? But independent of positive demerit, it must be inferred, on the principles of *Dyer v. Hargrave*, that he estimated the difficulty of procuring her compliance, and bid so much the less. Besides, for a contingent liability such as this, the proper compensation is not abatement but indemnity: *Miligan v. Cook*, 16 Ves. 12. Whether the covenant in the articles for "a good and sufficient title free from all incumbrances" might not be held in reserve for the court, we do not pronounce, though I see nothing at present to forbid it. Then, to apply these principles to our case:

The failure to furnish the seed wheat was immaterial. It was to have been sown for the vendee's own use, and he might dispense with it. But he insisted on entire performance as the condition of his tender; and on that condition, it was no tender at all. He demanded his title, which was undoubtedly the title called for in the articles, and he again called upon the vendor to fulfill the contract. Now a vendee requiring limited performance ought to leave the vendor under no misapprehension of his demand. The vendor made evasive replies, without alleging the intractableness of his wife, who was present, protesting she would never consent; but no one can say he would not have closed with a proposition to convey, without her concurrence, and without diminution of price. A tender in general terms must lead to a misconception of the object; and ought not unnecessarily to subject the vendor to the costs and vexation of a lawsuit.

Judgment reversed.

Equity will not attempt to compel the specific performance of a contract which requires the wife to join with her husband in its execution: *Weller v. Weyand*, 2 Grant Cas. 104; nor if the joinder required is of a stranger to the contract: *Fisher v. Worrall*, 5 W. & S. 486. But the party seeking the performance may waive the necessity of the joinder and require the specific performance of the residue of the contract: *Riddleberger v. Mentzer*, 7 Watts, 142; *Skurtz v. Thomas*, 8 Pa. St. 363; or if he is not willing to waive any right of this sort, he may resort to an action at law for damages, citing the principal case.

The doctrine of the principal case that equity will not attempt to coerce the wife, by acting upon the husband, is upheld in *Edrington v. Harper*, 20 Am. Dec. 145; *Squire v. Harder*, 19 Id. 446.

HATZFELD v. GULDEN.

[7 WATTS, 152.]

CONTRACT TO ENDEAVOR TO PROCURE A PARDON from the governor for a compensation, is immoral and void.

ASSUMPSIT. The opinion states the case.

Deckhart, for the plaintiff in error.

Jones and Smith, contra.

By Court, HUSTON, J. D. G. Gulden was plaintiff below, and brought case in assumpsit against Hatzfeld. The declaration consisted of three counts. The first set out that Hatzfeld had been indicted in the court of oyer and terminer of Berks county, and tried, and a verdict of guilty, and sentenced to confinement for twelve years. This was all set out at large, and sentence in full, and the dates. And that in pursuance of the said sentence, the said Hatzfeld was in confinement in the Eastern penitentiary in the county of Philadelphia, and on the — day of — at said penitentiary, in consideration that the plaintiff, at the special instance and request of said defendant, had then and there agreed with and undertaken, and faithfully promised the said defendant, to use all fair and honorable exertions to obtain from the governor of the commonwealth of Pennsylvania a pardon for the said defendant, being then and there imprisoned in pursuance of such sentence, etc. He, the said defendant, then and there agreed with, and faithfully promised to the said plaintiff to pay the said plaintiff the sum of one thousand dollars as a remuneration for his services and loss of time, in using his exertions to obtain from the said governor of Pennsylvania a pardon, etc.; and the plaintiff avers that afterwards, to wit, at, etc., the plaintiff did use all fair and honorable exertions to obtain, etc., and that by reason thereof the

defendant became indebted to pay the said sum of one thousand dollars so by him promised, yet although often requested, etc.

The second count states that the defendant was indebted to plaintiff in other one thousand dollars for services performed in obtaining from the governor of Pennsylvania a pardon for, etc., and being so indebted, promised, etc.

The third count charged that defendant was indebted to plaintiff in one thousand dollars, for money paid, laid out, and expended, etc., not mentioning the crime or pardon.

Afterwards another count by leave of the court was filed, setting out at large the indictment, trial, conviction, and judgment as in the first count, and imprisonment under the sentence; and that the said Adolph required the said Daniel to labor, and do his endeavor to obtain his, the said Adolph's pardon from, etc.; and that he afterwards did, by all the means he could, and by riding and journeying in the county of Berks, and to and from Harrisburg, etc., use all his endeavors to obtain, etc.; by reason of his exertions, riding, journeying, and many days' labor, reasonably deserved to have other one thousand dollars, etc. Plea, *non assumpsit*, and issue. The proof in the cause was various, and not a little of it. W. Lewars, J. S. Holloway, and Shoemaker, proved that Hatzfield said he would satisfy Gulden; one of them that he made his promise while still in the penitentiary, and two of them that he said so after he was pardoned. J. Baily proved that he and a Mr. Sontag were appointed a committee of Hatzfield's property. That Gulden applied to them, offered to go through the county to get signers. That they agreed to pay him one hundred dollars in hand, and another one hundred dollars if he got him liberated, in September, 1834; paid the one hundred dollars; also gave him fifteen dollars in August, 1834; and also fifteen dollars in March, 1835; he was to obtain above twelve hundred signers to the petitions; but did not get so many. Hatzfield was liberated in April, 1835. P. Geiger, a member of the legislature from Berks at that time, proved Gulden's exertions; witness went with him to the governor; that he wished witness to get signers; said they would pay so much a head; witness got signers, but said he did not want pay. Another witness proved that Gulden gave him fifteen dollars to pay Snell, who would not give up his petitions and signers till paid. Peter Bright proved that he got in Reading between four and five hundred signers, at the request of Gulden and Snell: and he was to have three cents a head. The above is the substance, with the addition that many refused to sign, etc.; some proof of

expenses paid by Gulden for horse hire to the amount of from ten to fifteen dollars.

The court told the jury: "There can be no recovery on an illegal contract, neither can there be a recovery on contracts which are prohibited by law; nor on contracts against which penalties are enjoined; nor a party can not successfully come into court and say, 'Give me a sum of money which I claim, against or in violation of law.' This would not be tolerated nor countenanced; but I am not aware that it is unlawful to obtain a pardon by lawful means." And again: "If the defendant did employ the plaintiff to travel and spend time in procuring signatures to petitions, and to go and carry these petitions to the governor, and promised to pay him for his time, labor, and trouble in performing this service, I think he can recover a reasonable and just compensation therefor."

The first three errors were in entering judgment for the plaintiff: because on these pleadings judgment should have been entered for the defendant; that the court ought to have told the jury that on these pleadings and proof, this action could not be sustained; and the third is the same in substance. From the point to which the attention of the counsel was called by the court, nothing was said about these first three assignments of error. The case was put on the last count, and that a verdict on it was good; be it so; but perhaps it will be found that in all actions founded on illegal or immoral considerations, or on what is contrary to decency, or public good or policy, the form of the action or declaration on the evidence of the claim is immaterial, if the individual injustice or general good forbids such contract, or the law prohibits it; perhaps there is no case in which it can be made good and available by the mode of evidencing the agreement, or the form of action used to carry it into effect. To say nothing of gaming prohibited by law, marriage, brokerage bonds, obligations entered into in restraint of trade.

In 4 T. R. 466,¹ we find a suit on a bill of exchange; at the trial it came out that the bill or bills were given to pay the balance due for brandy sold in Guernsey to be smuggled into England. Lord Kenyon said there was no harm in selling brandy; it was the intent and design of the transaction which made it such that a court ought not to carry it into effect; and so far was this carried in 5 T. R. 592,² it was held that a Frenchman who sold brandy to be smuggled into England, could not recover the price in England, though he had violated no law of his own

1. *Olugas v. Penatena*.

2. *Waymell v. Reed*, 5 T. R. 599.

country where he made the sale. The case of *Mitchell v. Smith*, in 1 Binn. 110 [2 Am. Dec. 417], was debt on a single bill drawn in the usual form. The consideration was one forbidden by the policy and laws of the state; no regard was paid to the pleadings, and no one suggested that they could have any effect on the decision; and the cause went on the broad ground that if the transaction out of which the claim arose was forbidden by positive or general law, the claim could not be recovered. The power to pardon is a constitutional power; to alleviate or remit punishment where perhaps there is doubt of guilt; or where the offense was committed under circumstances extenuating the crime, etc. The general and spontaneous expression of opinion has had, and ought to have, weight with the governor. But if undue means are used to obtain petitioners, it may be a great imposition on the governor. The power to pardon may be considered as a part of the penal code of the state; it operates after trial to be sure, generally, but may be exercised before. It is as important that it should be free from bias, or prejudice, or crime, as that the trial should be so. No man would say, that if it were possible to procure a pardon by direct payment to a governor, it would be lawful to give one. To bribe others to deceive and impose on him, only differs in degree.

In this case the first offer came from Gulden to the trustees of the prisoner: they paid in hand, before he stirred, one hundred dollars; and afterwards, at least twice, fifteen dollars; through the whole business, he appears to be acting, not from pity, not from a sense that the punishment was too severe, not from friendship to the prisoner, but for his own gain and emolument. At his last interview in the cells, Halloway is called back to witness a promise of payment. It is not necessary to say whether, after the whole transaction is closed, a person who incidentally paid some postage, or who, under special circumstances, carried a petition, the signatures to which were spontaneously made, may not receive his actual expense and daily pay. I would say it must be a very special case, however, to justify this. But this is not such a case; and we do not wish to see advertisements, that pardons will be obtained at the lowest price, nor anything which approaches to it; and generally, all contracts to change the course of trials, or the effects of trials, whether to obtain a liberation of a prisoner by money to the jailer, or to obtain a pardon by the use of money, directly or indirectly, must be void.

Judgment reversed.

Contract to procure the passage of an act of the legislature by any sinister means, or by using personal influence with the members of the legislature, is void: *Clippinger v. Hepbaugh*, 5 W. & S. 320; and if a sale is opposed to a statutory provision, it will also be void, though the existence of the prohibition is only to be inferred from a penalty affixed, by law, to such contracts: *Evans v. Hall*, 45 Pa. St. 236, citing the principal case.

ACT FORBIDDEN BY LAW is not sufficient consideration to support a promise: *Lin v. State Bank*, 25 Am. Dec. 71 and note 79.

WITHERS v. BAIRD.

[1 WATER, 221.]

MAGISTRATE INTERESTED IN OBTAINING A CONVEYANCE can not take the wife's acknowledgment thereto.

TENDER OF PERFORMANCE OF A MUTUAL COVENANT can not be made at the time of trial, for the first time, and yet support the action; it should be made before the action is instituted.

COVENANTS WITH RESPECT TO TITLE OF PROPERTY will apply to other property, which it is agreed may, in a certain event, be substituted for a part thereof.

COVENANT TO FURNISH A WARRANTY DEED means a deed with special warranty, and not a deed with general warranty and with covenant against incumbrances.

WHERE INCUMBRANCES ARE CREATED ON LAND SUBSEQUENT TO AGREEMENT for the sale thereof, the agreement can not be enforced while the incumbrances burden the land.

COVENANT. Baird agreed to convey to Withers a tract of land, by good and lawful conveyance, free from all incumbrances. The conveyance, it was explained in the agreement, was to be "only a warranty deed, subject to all demands of the commonwealth." Prior to this agreement, a verbal understanding existed between Baird and Baxter, to the effect that they should exchange six acres of the tract to which this contract related, for four acres owned by Baxter. The agreement therefor provided that unless this understanding was rescinded, Baird should convey the four acres, instead of the six for which they were exchanged, to Withers. The understanding was not rescinded, and to simplify matters, it was agreed that Baxter should convey directly to Withers. In pursuance of this agreement, Baxter and wife executed a deed of the land to Withers, and delivered it to Baird. Baird, who was a magistrate, also took Mrs. Baxter's separate acknowledgment. Baxter afterwards obtained judgment against Baird for about one thousand five hundred pounds. After all of these occurrences, Baird tendered to Withers Baxter's deed and his own deed for the residue of the tract em-

braced by the agreement, and demanded the purchase money. Withers refused, whereupon this action was brought upon his covenant to pay. Withers defended upon grounds that are set forth in the opinion. The charge to the jury also appears from the opinion. There was verdict for plaintiff.

Rogers, for the plaintiff in error.

Buchanan, *contra*.

By Court, GIBSON, J. I see no necessity for a special authority from Baxter to tender his deed. Delivery of it to the plaintiff below, with knowledge of the purpose to be effected by it, was sufficient to make it an escrow; and the plaintiff, who was bound to make the title, was the person to tender it. But the acknowledgment was palpably insufficient to bar the dower of Baxter's wife. The office of a magistrate, in respect to private examination, is a judicial and a delicate one. Intrusted with the business of inspecting the wife's knowledge and will, he should be superior to all exception on the score of impartiality. When he is bound to procure her concurrence, his inducement to abuse his trust is as strong as if the conveyance were made to himself; and it would not be pretended that his judicial functions could be exercised in his own case. His responsibility for the conveyance, whether through himself or directly to the defendant, made him equally a party in interest; and no consent short of an agreement by the vendee to take a defective title, which is not pretended, could supply the place of a separate examination. To say the wife might precedently waive her protection from it, would be absurd: she can waive nothing or assent to nothing except in the way pointed out by the law. Nor can I see how the tender of an unexceptionable conveyance at the trial, or before leave to take the money out of court, could be an equivalent for tender before suit brought. The execution of the conveyance, and payment of the purchase money, were mutual conditions; and a right of action could not accrue on the one side without a tender of performance to the other. This is, in substance and in form, an action at law; and though equitable circumstances might dispense with performance strictly at the day, the plaintiff must have done everything incumbent on him before action brought.

The direction that it was unnecessary to show title to the four acres out of the commonwealth, was well enough. These were taken in exchange for a part of the original tract, and were to be conveyed to the defendant only in case the part of it parted with

could not be re-acquired. But the conveyance of the original tract was to be expressly subject to the claims of the commonwealth; and in the absence of special provision to the contrary, it would be unreasonable to apply to the equivalent anything but the covenants applicable to the thing for which it was substituted. It is objected, that the plaintiff's own conveyance is without a general warranty or covenant against incumbrances. But a warranty deed, for which alone the vendee stipulated, is, in popular phrase, a deed with special warranty; and that the parties meant no more is evident from their declaration that they intended "only a warranty deed, subject to all the demands of the commonwealth." For a covenant against incumbrances the contract did not call, it being sufficient to show that the land was in fact unincumbered. The direction, that the court's control over the application of the purchase money was a substitute for the extinguishment of Baxter's judgment before action brought, was decidedly wrong. The judgment bound the vendor's interest in the land, or in other words, the legal title to the value of the unpaid purchase money. A purchaser under it would be entitled not to possession of the land, but to the benefit of the covenants for the price of it; he would, in short, stand in the place of the vendor, entitled to his rights and subject to his responsibilities. It must be obvious, therefore, that payments to the vendor, subsequent to an incumbrance of his title, would not prevail against the incumbrancer. The vendee is a purchaser of an inchoate title, and being bound to notice all defects, his payments are at his peril. On the other hand, the vendor may not call for the purchase money while there is an incumbrance outstanding. He can not compel an appropriation of it in the vendee's hands at the expense of costs and the vexation of a lawsuit to one who had done everything incumbent on him to entitle himself to a precise execution of the contract. What is it to him that the vendor may be unable to raise a sum sufficient to clear the title? The vendor's misfortunes can give him no right against one who is not in default. If by reason of the perils that would attend payment to him, he can not ask it amicably, it is not easy to discover how he can compel it under the court's mediatorial discretion to apply the purchase money to the vendee's protection. The direction was palpably wrong.

TILGHMAN, O. J., and DUNCAN, J., concurred.

Judgment reversed, and a *venire de novo* awarded.

WHEN DISQUALIFICATION TO TAKE ACKNOWLEDGMENT EXISTS. — An acknowledgment is an authentication of an instrument that enables it to be used for purposes of evidence in a manner different from what it could have been previously. The duties of an officer taking an acknowledgment seem to be at the same time judicial and ministerial. Judicial in that the officer has to determine upon the identity of parties, etc., and ministerial in that he has to give a certificate of the facts found. Regarding his duties as judicial, no officer may take an acknowledgment of a deed in which he is interested, for no one may be a judge in his own case; besides it would be an attempt to create evidence in one's own favor, an attempt, too, which must in the majority of cases be altogether irresponsible.

This recognition of the *quasi* judicial nature of the act of taking an acknowledgment is quite general. We quote from the case of *Wasson v. Connor*, 54 Miss. 352: "The deed of trust was made by Hines to Thomas O. Connor for the use and benefit of S. M. Davis and W. V. Davis. It was acknowledged before W. V. Davis, who was the chancery clerk of the county, and by him recorded; and it is admitted that the W. V. Davis who thus received and certified to the acknowledgment and recorded the deed is the same person named in the instrument as one of the *cestuis que trust*. Whatever may be said of the receiving for record and recording a deed, it is evident that the taking of an acknowledgment of a grantor is a *quasi* judicial act, and can not be performed by the grantee in the deed. The officer who takes an acknowledgment acts in a judicial character in determining whether the person representing himself to be, or represented by some one else to be the grantor named in the conveyance, actually is the grantor. He determines, further, whether the person thus adjudged to be the grantor does actually and truly acknowledge before him that he executed the instrument. By his certificate he makes an official record of his adjudication on those points, which can not be impeached by himself, and sometimes can not be impeached by the grantor. Inasmuch as no man can be a judge in his own case, it follows that the grantee in a deed can never act as an officer in taking an acknowledgment to the conveyance." Accordingly, it was held that the deed was improperly admitted to record, and that, therefore, such record did not import constructive notice. That the grantee in a deed may not take an acknowledgment thereto, see also, *Beaman v. Whitney*, 20 Mo. 420; *Wilson v. Traer*, 20 Iowa, 233; *Groesbeck v. Seely*, 13 Mich. 329; *Stevens v. Hampton*, 46 Mo. 404, where the rule was applied, in a case where an acknowledgment was taken by a grantee, who was but a trustee; and *Brown v. Moore*, 38 Tex. 648, where an acknowledgment taken by the trustee in a deed of a trust, executed to secure the payment of indebtedness was held void, on account of the interest the trustee had in the matter, which was to the extent of his commissions.

The case of *Wilson v. Traer*, 20 Iowa, 233, denies that an instrument, the acknowledgment of which was taken by a person interested in obtaining its execution, is entitled to record, though that interest does not appear from the face of the instrument. It must be admitted, however, that the view that a notary acts in taking an acknowledgment in a judicial capacity, is controverted by the case of *Lynch v. Livingston*, 6 N. Y. 422. In that case the commissioner who took the acknowledgment was so related to the grantees, that he would have been disqualified under the provisions of the revised statutes from acting as a judge or juror in any case to which they were parties; but the court held the acknowledgment good because the taking of an acknowledgment involves the discharge of no judicial duty. The case of *Kimball v. Johnson*, 14 Wis. 682, seems similar

in principle: it was there decided, but no reasons were given for the decision, that the husband of a mortgagee might take an acknowledgment of the mortgage. It has been held that the protest by a notary public who is a stockholder in the bank, which is a party to the suit, is incompetent evidence to charge an indorser: *Bank v. Porter*, 2 Watts, 141. The court said: "The protest of a notary is his deposition to the truth of the facts contained in it; and his position in the cause is that of a witness deposing under the sanction of an official oath to which no temporal penalty is annexed; and can it be supposed that the legislature intended to make him competent, when he would not be heard under the sanction of a judicial oath, for the violation of which he would be exposed to the pains and penalties of perjury? The danger to be apprehended from such competency would be imminent, as the defendant being seldom able, from the nature and circumstances of the case, to disprove the protest but by the notary himself, would have no other recourse than the testimony of a witness, not only interested against him, but substantially a party to the cause." Some of these reasons have of course lost weight, but the principle of the decision seems to be salutary, and if so, as it would apply with equal force to the case of a notary taking an acknowledgment, it should also vitiate any acknowledgment taken under parallel circumstances.

VENDOR CAN NOT ENFORCE SPECIFIC PERFORMANCE while an incumbrance exists on the land, which was not to enter into the consideration, by the terms of the agreement of sale: 35 Pa. St. 383.

An agreement "to well and sufficiently grant and assure" will not entitle to a general warranty, but only to a special warranty against the acts of the grantor: *Cadwallader v. Tryon*, 37 Id. 322; *Lloyd v. Farrell*, 48 Id. 78.

FRENCH v. SEELY.

[7 WATTS, 231.]

NO COMPENSATION WILL BE ALLOWED IN EQUITY FOR IMPROVEMENTS put upon land by one who has entered under a contract to obtain the title, which he has, subsequently to his entry, repudiated.

EJECTMENT. French and Seely agreed to exchange lands, and under the agreement Seely entered on the land in controversy. After his entry on the land, Seely thinking he had discovered an imperfection in French's title, and that he could obtain a patent for the land from the commonwealth to himself, attempted to do so; the board of property however decided against him, and a patent was issued to French. Seely did not contest this determination within the period allowed by the act of 1792, so that it became final. After the entry Seely also sold the land which he agreed to exchange for this to one Strong. He now contended that he was entitled to a conditional verdict. The judge so instructed the jury, who brought in a verdict for plaintiff subject to be set aside, and a verdict entered for defendant for two hundred and fifty acres in the eastern portion of the

tract upon his paying into court for plaintiff, within two years, the sum of three hundred and fifty dollars, with interest and costs.

Overton, for the plaintiff in error.

Elwell and Williston, contra.

By Court, GIBSON, C. J. This is a remarkable case. A party to an exchange who had renounced it by setting up an adverse title to the land he had obtained by it, and who sold the land he was to have given in return, was still allowed to recur to the contract for purposes of defense! And how? On the principle of an injunction in the nature of a bill for specific performance, invigorated in the particular instance, it was thought, by improvements made in defiance of the title. It is scarce necessary to say that this was a violation, not only of *Ong v. Campbell*, 6 Watts, 392, and the chancery precedents which require that a party insisting on a contract should have been faithful to it, but of every analogy of the law. It is to prevent a party from recurring to a contract he has repudiated, that a recusant tenant is forbidden to insist on notice; or a widow, who has taken a benefit to her husband's will, to insist on dower in contravention of it; or a plaintiff, who has disaffirmed an act by an action in one right, to affirm it by an action in another; or, in short, any one to claim in repugnant rights. In addition to this, the party insisting on performance here, not only has refused to perform himself, in contravention of a principle which requires a tender to precede a demand of specific execution, but has actually disabled himself from affording it. And what did he offer in place of it? Nothing but a pecuniary substitute which would turn the exchange into a sale; and it was allowed to pass. Was that the plaintiff's bargain, or a bargain made for him? He was denied the specific consideration which had moved him to part with his property, and compelled to accept a compensation for it. This result is a curious sort of specific execution. What authority had he given the jury to sell his land? It is the vice of the times to disregard contracts; and there is a too prevalent disposition in the popular branch of the judiciary to remold them in order to bring them nearer to its standards of conscionableness, which can not be too narrowly watched.

Even were such a power vested in the jury, there is nothing in the case for an exercise of it. The improvements could not give the defendant an equity, natural or artificial. Believing the land delivered to him pursuant to the bargain, to be as open to

appropriation by him under a title from the state as it had been to the plaintiff, and having not only taken out a warrant for it, but sold what he was to have given for it—a double renunciation of the contract, he engaged with the plaintiff in a contest for it before the board of property, whose decision against him he suffered to become conclusive by lapse of time; and having thus been turned into a wrong-doer, he made the improvements in question. The case then presents an attempt, not merely to make an owner debtor for improvements made in contempt of his will, but to divest his property for a compensation graduated by a jury; and this, not to serve a public purpose, but to compensate in the name of equity, the adverse improvements of a private trespasser. To do that, would transcend the constitutional power even of the legislature, to say nothing of the admitted want of pretension on the part of the judiciary. It is impossible to imagine anything more palpably illegal than the exercise of such a power here. The defendant's supposititious equity was put on the absence of fraud, when each of his acts was, in contemplation of law, an unqualified fraud. His attempt to prove an adverse title, colorable, we must suppose, from his acquiescence in the decision of the board of property, was a fraud; the sale of his own land, in disaffirmance of his contract of exchange, was a fraud; and his subsequent erection of improvements, in contemplation of an equity from them, was a fraud and a folly. He had, then, not the shadow of a defense; and the direction prayed for should have been given.

Judgment reversed, and a *venire de novo* awarded.

A contract can not be disaffirmed in part and affirmed as to the other part; the party seeking any benefit therefrom must treat it as an entirety, and as such either confirm or abandon it. Therefore a creditor can not, at the same time, claim the benefit of an assignment executed for the benefit of creditors, and attack its validity by attaching property conveyed thereby: *Trustees of Bank of United States*, 2 Para. 147, citing the principal case.

HEPBURN v. CURTS.

[7 WATTS, 300.]

THE LEGISLATURE MAY CREATE IN FAVOR OF PENDING ACTIONS additional remedies for the enforcement of rights which are therein attempted to be enforced; thus it may declare that no action then pending shall abate because the firms who are respectively parties defendant and plaintiff have a common member.

Assumpart. Upon the trial the jury was instructed that the action could not be sustained because Samuel Hepburn, who was a member of Hepburn, Langcake & Co., plaintiffs herein, was also a member of the firm of Curts, Hepburn & Co., who were defendants. Verdict went for defendants. Pending the writ of error which was taken out in the case, an act was passed which authorized such actions as these to be brought in the future, and also extended its provisions to actions then pending, whether on writ of error or otherwise.

Armstrong and Anthony, for the plaintiffs.

Parsons and Greenough, contra.

By Court, **SERGEANT, J.** It is unnecessary now for the court to decide on the points assigned as errors in the charge of the court below by the plaintiffs, because we are of opinion that this act of assembly applies expressly to the present case, and makes it imperative on us to remit the suit back to the court of common pleas for trial and judgment. The suit was pending on a writ of error. The objection to the plaintiffs' right to sustain their action is that mentioned in the act, that one of the partners, Samuel Hepburn, is both plaintiff and defendant in a suit brought by him and his partner in one firm, against himself and his partners in another firm. The act of the legislature removes this objection, and authorizes and directs the courts to sustain the action as well in pending cases as in future ones. It thus furnishes a remedy where none existed before; and does so, in pending cases, without divesting any right, impairing any contract, or exercising any *ex post facto* legislation in the judicial sense of these words of the constitution. The legislature, provided it does not violate the constitutional prohibitions, may pass retrospective laws, such as in their operation may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of recovering redress by legal proceedings. Here the rights of the parties are not touched; but an objection existed arising out of the nature of an action at common law which interposed a bar to the trial of right—an objection which a court of equity does not allow to prevail, but, by means of the greater freedom and flexibility of its process, calls all parties before it, and renders complete justice. This objection the legislature removes, and authorizes a court of common law, by the ordinary common law process, to entertain the suit and to do justice between the parties: the method which in this state we

have frequently been compelled to employ for want of courts of equity, sometimes by the legislative enactment, and sometimes by an amplification of the jurisdiction of the courts, in order to incorporate equity principles and equity relief into our system as far as possible. In pursuance, therefore, of the directions of this act of the legislature, this cause must be remitted to the court below, that they may proceed according to its provisions to trial and judgment, as though the parties, plaintiffs and defendants, were separate and distinct parties.

Decree accordingly.

The power of the legislature to give an additional or modify an existing remedy, or remove legal impediments that lie in the way of the enforcement of a right, is recognized in the cases of *Biddle v. Starr*, 9 Pa. St. 467; *Schenley v. Allegheny*, 36 Id. 57; *Weister v. Hade*, 52 Id. 480. But where the remedy forms part of the contract it can not be made more onerous by a legislative act. Thus, if by the charter of a bank it is provided that its privileges shall not be declared forfeited at the instance of a creditor, unless payment in specie has been refused him for the term of three months, an act which declared an immediate forfeiture of the charter upon proof of refusal, will be unconstitutional: *Commonwealth v. United States Bank*, 2 Ashm. 378. But the power is not defeated by a right to costs which has accrued to one party to an action. Thus, if after suit instituted to recover a tax paid under protest, the informalities of the tax levy are cured by an act of the legislature, the suit must fail: *Grim v. School District*, 57 Pa. St. 438.

The case of *Lycoming v. Union*, 15 Pa. St. 168, recognizes the further doctrine, that the legislature may give a remedy to enable the enforcement of what is a mere moral obligation. Then the act of the legislature which was upheld provided for the re-imbursement to Union county by other counties, from which certain causes had been removed for trial to the former, of their fair proportion of the expenses thus caused Union county.

MORITZ v. GARNHART.

[7 WATTS, 302.]

FATHER WHO HAS ASSUMED THE CARE AND EDUCATION OF THE ILLEGITIMATE CHILD OF HIS DAUGHTER, the custody of the child having been abandoned both by the mother and father, will stand in reference to the child *in loco parentis*, and may maintain an action for its abduction.

CASE for the abduction of Rebecca McEwen from plaintiff. Said Rebecca was the illegitimate daughter of plaintiff's daughter, and had lived for several years prior to the abduction in plaintiff's family. The court thought the action could not be maintained for the reasons set out in the opinion, and so instructed the jury.

Merril, for the plaintiff in error.

Jordan, contra.

By Court, GIBSON, C. J. The court thought the action could not be maintained on the relation of master and servant, unaided by that of parent and child, without proof of service by hiring. Such undoubtedly was the rule of the common law; and in the case of an ordinary servant, such it is still. In the case of a child, however, it is so far relaxed that employment in acts of service is equivalent to a state of servitude. The most frequent occasion for its operation thus mitigated is furnished by the action for seduction founded technically on the relation of master and servant, but requiring by reason of the plaintiff's paternity, proof of no more than slight and desultory acts of service when the child had come of age. Yet a state of servitude, of some sort, must be established. And this relaxation has not been superinduced by the peculiar turpitude of seduction, the more readily to get at the punishment of it as a particular wrong; but it holds indifferently in cases of seduction, abduction, and corporal injury, without regard to the sex. In an action for an assault on the plaintiff's infant son *per quod servitium amisit*, Lord Kenyon went the whole length of dispensing with proof of employment, and holding it sufficient for the action that he was living in the father's family and under his protection: *Jones v. Brown*, Peak. N. P. Cas. 233; S. C., 1 Esp. N. P. Cas. 217. If then the plaintiff in the case at bar were the putative father, there would be a sufficient implication of servitude from that alone to maintain the action. As the illegitimate offspring of his daughter, however, he is not legally related to it; and whether he may have an action in *loco parentis* for the loss of its service is a question which occurs for the first time. Why may he not? Though a bastard be not looked upon as a child for any civil purpose, the ties of nature are respected in regard to its maintenance. The putative father, though not legally related to it, is so far considered its natural guardian, as to be entitled to the custody of it. In *The King v. Cornforth*, 2 Stra. 1162, the court granted an information for the abduction of a natural daughter from the protection of her putative father, thinking that a bastard is within the 4 and 5 Ph. & M., c. 8, which punishes the taking away of any maid or unmarried woman child from the possession of the father, mother, or person having the governance of it. Between the father and the mother, however, the latter seems to have the prior claim: *Ex parte Knee*, 1 N. R. 148. For if the father obtain the custody surreptitiously, the king's bench will make him restore it: *Rex v. Soper*, 5 T. R. 278;

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S. P., *Rex v. Mosely*, 3 East, 224;¹ and *Rex v. Hopkins*, 7 Id. 579. Indeed it seems to have been doubted in *Strangeways v. Robinson*, 4 Taunt. 498, whether he has a right to the custody in any case. Yet in *Rex v. Cornfoot*, 1 Boot's Poor Laws, 465, it was held that a putative father has a natural right to the care and education of his illegitimate child; and in *Newland v. Osman*, Id. 466, he was allowed to take it from the parish and maintain it.

It may be safely said, then, that the law recognizes the rights of putative paternity for purposes of nurture and education. Here both father and mother had abandoned those rights; and shall they not be recognized in the person of the grandfather, so far as to induce a relaxation of the rule which ordinarily requires proof of service by hiring, in an action for the deprivation of it? He is indeed not a parent, but he is chargeable by the poor laws with the duty of one. The rights of a parent are pupillary; and as they are given for the benefit of the child, the person in the exercise of them must necessarily have a correlative remedy for their infraction. Independent of consanguinity, however, there is an interest which seems to be peculiarly his own, and proper for personal compensation. Who has not seen an adopted child become an object of as tender a solicitude as if it had issued from its foster-father's loins; and can it be said that having bestowed his affection on it, and reared it by his bounty, he yet shall not be permitted to exercise the rights of a father to it against an intermeddler? It would be a reproach to the law if he should not. But the stern simplicity of feudal principles is gradually bending to the more complicated relations of a milder civilization. So late as *Barham v. Dennis*, Cro. Eliz. 770, a father had no remedy for the abduction of any of his children but the heir at law: at this day, by means of a servitude almost fictitious, power is put into his hands to redress almost every injury that may be done to them; and it seems to be a natural and necessary step to put the same power into the hands of every one acting in a father's place. The defendant is a stranger in blood. He is father to the mother's husband; but it appears not that he acted by her authority; nor is it clear that she herself could have resumed it. After an abandonment of it for six years, she could reclaim it only through the order of a court, who would not lightly deprive the foster-father of the expected fruit of his pains in the service and duty of the child. Here it is alleged, without proof, that its morals were endangered by the associations of the family; but

though that would be a ground of summary interference by the competent authority, it could operate here only in mitigation of damages. On the facts in evidence, the plaintiff had made out a case to recover.

Judgment reversed, and a *venire de novo* awarded.

BENNET v. PAINE.

[7 WATTS, 334.]

WHERE A CERTIFICATE OF ACKNOWLEDGMENT CONTAINS NO ASSERTION of magisterial character, proof of the existence of that character may be made *aliunde*.

CERTIFICATE OF RECORDER OF DEEDS to a copy of the commission of a justice of the peace on record in his office, is competent proof of the official character of such justice, where that fact comes collaterally in question.

EJECTMENT. Plaintiff below, defendant in error, introduced in support of his title, amongst others a deed from J. McAllister. The certificate of acknowledgment to this deed contained no assertion of the magisterial character of the person by whom it was taken. To supply the defect, plaintiff offered a copy of the commission of a justice of the peace, issued to such person, taken from the records of Dauphin county, and to which was appended the certificate of the recorder of the county to the effect that it was a true copy. Defendant objected to the reception of these instruments in evidence. The objections were overruled.

Elcell and Greenough, for the plaintiff in error.

Overton, *contra*.

By Court, GIBSON, C. J. The certificate of acknowledgment certainly contains no assertion of magisterial character. It is not affirmative of either office or place; but may not proof of these, as in *The Commissioners v. Ross*, 3 Binn. 539 [5 Am. Dec. 383], be supplied *aliunde*? In that case, a deposition, in the caption of which it was neither stated nor apparent that the examiner was a justice for the county, was received on the authentication of the fact by the prothonotary's certificate; and in what does it differ from the present? In nothing, perhaps, but that the identity of the person was more distinctly disclosed; and that the supplemental certificate was given by the prothonotary instead of the recorder.

The evidence that the act was done within the jurisdiction of him who is thus proved to have been a magistrate, is equal, if

not greater, in the present; for we have the exemplification of a commission to a person of the same name who was commissioned for the county in which the grantors reside. In *Dunn v. The Commonwealth*, 14 Serg. & R. 432, the exemplification of a sheriff's bond, required by statute to be taken before the recorder of deeds; was rejected, though the name of the subscribing witness was identical with that of the recorder, because it was thought the statutory proof of execution, which was the fact directly in issue, ought to be as entire as the common law proof intended to be superseded by it. Here there is no substitution of statutory for common law proof; and the question of identity is collateral. Is it too much, in the absence of counter proof, to presume that the person named in the commission is he who received the acknowledgment? It may have possibly been certified by another of the same name, there or elsewhere; but so might it be, did it contain an affirmation of character and place. The proof to sustain the certificate in that case and in this, is the presumption which the law makes in favor of legality. The place of taking a deposition is seldom noted, because it is to be presumed that a magistrate performs his functions within the confines of his jurisdiction; and are we not to presume that a private citizen has not usurped the authority of a magistrate? If the presumption were unfounded in this instance, it might have been rebutted. An inquiry at the secretary's office would have led to the county of the magistrate's residence; which would have made it easy to disprove the act were he indeed a stranger to it.

It is to be presumed, also, that the recorder of deeds had authority to exemplify the commission. The universality of the practice of recording these commissions in the county, proves that it rests in the mandate of a statute lost or forgotten. We know there are ancient rolls which, by reason of the confusion that has prevailed in that office, do not appear among the printed statutes. A remarkable instance of this is said to have occurred in the production by the late deputy secretary of such a statute on the subject of official bonds which have been taken from time immemorial, it was formerly thought, without being exacted by authority. But the antiquity of the practice would give it the force of customary law, which is the foundation of a prothonotary's certificate of official character—a document that is always admitted without exception. In questions of collateral authentication the strictness of common law proof is much relaxed; for the naked assertion of the officer would cer-

tainly not be *prima facie* proof of his official character were it put on issue by the pleadings; and that the relaxation is not only harmless, but convenient, is proved by daily experience. We are of opinion, then, that the certificate of acknowledgment was competently authenticated.

Judgment affirmed.

ACKNOWLEDGMENT TO DEED OF A FEME-COVERT which fails to show that she was separately examined is void; and the testimony of the officer taking the acknowledgment is not admissible to prove that there was a separate examination: *Jourdan v. Jourdan*, 11 Am. Dec. 724; *Barnet v. Barnet*, 16 Id. 516.

The question as to when parol evidence is admissible to vary a certificate of acknowledgment is discussed in the note to *Smith v. Ward*, 1 Am. Dec. 81

DORSEY v. DORSEY.

[7 WATTS, 349.]

RIGHT TO DIVORCE IS REGULATED BY THE LAW OF DOMICILE of the parties at the time that the offense against the marital relations is committed, whether or not the marriage was contracted elsewhere.

POWER TO GRANT A DIVORCE FOR A PAST TRANSGRESSION is not taken away from the tribunals of the jurisdiction in which the offense occurred, by a subsequent change of domicile.

DIVORCE WILL NOT BE GRANTED IN ONE JURISDICTION for an offense committed while the parties were domiciled in another.

LIBEL for a divorce. The offense charged was desertion of the husband. The marriage took place in Pennsylvania. After the marriage the parties removed to Ohio and established their domicile there. While in Ohio the desertion occurred. The wife thereupon returned to Pennsylvania and now sought a divorce. The libel was dismissed for want of jurisdiction.

Veech, Dawson, and Austin, for the appellant.

McKenna, *contra*.

By Court, GIBSON, C. J. If the court below had jurisdiction on any known principle, it is that of the *lex loci contractus*. The marriage was celebrated in Pennsylvania; the parties were native inhabitants of Pennsylvania; and it was not long before the desertion that they had acquired a domicile in Ohio. The appellant again resides in Pennsylvania, but her husband does not; and if her domicile of origin could be an effective ingredient in her case, she would be prevented from resuming it by the coverture, which suspends her separate existence and makes his dom-

icile hers. We have, then, the case of a marriage betwixt inhabitants of our own state, with a subsequent domicile elsewhere; and we have a petition by one of them to be divorced from the bond of matrimony for a conjugal wrong done when she was not under the protection of our laws, and by one who was not then, and is not yet, amenable to them.

In constructing our international law of divorce we naturally look for the materials of it in the jurisprudence of our ancestors, whose institutions are more congenial with our own than those of their continental neighbors, and whose process of forensic discussion is usually more exact; but we find an irreconcilable difference betwixt the decisions of the English and of the Scottish courts. The English judges acknowledge the legitimacy of no jurisdiction which is not founded on the law of divorce at the place of the marriage, if it be an English one; while the Scottish, in the other extreme, are willing to found theirs even on a temporary residence of the complainant in the country of the forum. Of the latter pretension I shall say little more than that it is, in truth, a usurpation of power to intermeddle in the domestic concerns of a neighbor. If a *bona fide* domicile, in the strictest sense of the word, were not essential to jurisdiction, there would be nothing to prevent the exhibition of a libel by a proctor, and without the presence even of the complainant. But the respondent's presence would be more essential still; for a sentence against one whose person was not subject to the jurisdiction would be void on the plainest principles of natural law. Moreover, it is not perceived how the presence of even both could confer jurisdiction of a cause of divorce which was not, in its inception, subject to the law of the forum. It seems to me, the fallacy in the reasoning of the Scottish judges, plausible though it be, consists in their assumption that divorce is a penalty everywhere impliedly annexed to a breach of the marriage contract; which, like a civil cause of action attendant on the person, may be enforced anywhere; thus forgetting that whether it be a penalty at all depends, not on the Scottish law as an interpreter or an avenger, but on the law of the domicile, or else on the *lex loci contractus*, which exclusively furnishes the original conditions. The English doctrine, on the other hand, is not more reconcilable to our principle of finite allegiance; for, notwithstanding the doubt and manifest inclination of Doctor Lushington in *Conway v. Beasley*, 3 Hagg. Ecc. 369,¹ I take it to be settled by *Lolley's case*, 1 Russ. & Ry. Crim. Cas. 236, sanc-

1. 3 Hagg. 639.

tioned in *Tovey v. Lindsay*, 1 Dow. 124, by the preponderating weight of Lord Eldon's name, that the dissolution of an English marriage, for any cause whatever, can be effected, so as to be acknowledged in that country, only by English authority. It was, indeed, intimated in *Conway v. Beazley*, that the question of jurisdiction in *Lolley's case* perhaps turned on the difference betwixt temporary and permanent residence; but the report certainly does not indicate it; and indeed the conclusion attained was an unavoidable consequence of the British tenet of perpetual allegiance. Though an English subject acquire a foreign character from a foreign domicile, insomuch as to be dealt with as an alien for commercial purposes—though he formally renounce his primitive allegiance and profess another, he is accounted but a sojourner while abroad, and England, by the dogma of her government, in his home and his country still.

Holding this dogma it would be strange did she tolerate foreign interference with his domestic relations within her pale. Insisting on jurisdiction of his person, absent or present, she necessarily regards an attempt to change any one of these as an invasion of her sovereignty; and in that respect it can not be denied that the matter is within her province and her power; for, though the status of marriage be *juris gentium*, the institution is undoubtedly a subject of municipal regulation. And it is this perpetual allegiance to the country, its institutions and its laws—not an indissolubility of the marriage contract from the presumption, will, and reservation of the parties—which is the root of the English doctrine. It truly assumes that marriage is contracted on the basis of the laws, and these forbid a British subject to dissolve it by the authority of any other country; but take away the law of perpetual allegiance, and you take away the foundation of the presumptive pledge not to submit the duration of it to foreign action. The law of the place is necessarily the law of the marriage for its primitive obligation; but, except on the principle of perpetual submission to its supremacy in all things, it is not the law of the contract for the determination of its solubility. Is, then, a rule thus founded adapted to the jurisprudence of a country whose law of allegiance is different, and whose asserted right of affiliation, in respect to those whom it admits, on that ground, to its civil and political privileges—divorce among the rest—concedes the same right to every other country? Framed on the basis of this law, the contract implies no perpetuity of municipal regulation. While the parties remain subject to our jurisdiction the marriage is dis-

solvable only by our law; when they are remitted to another, it is incidentally remitted along with them. And that consequence must ensue as well where they are remitted to a jurisdiction entirely foreign, as where they are remitted to that of a sister state; for whatever *ultraterritorial* force a sentence of divorce by a court of competent jurisdiction may have been thought to gain from the constitutional precept that the judgment of a state court receives the same faith and credit in every other state as in its own, nothing in the federal constitution or laws has been thought to touch the question of jurisdiction, and the members of the union therefore stand towards each other, in relation to it, as strangers. With what consistency, then, would naturalized citizens be allowed our law of divorce were the validity of a divorce by the law of domicile in a sister state disallowed because the marriage had not the same origin? Transfer of allegiance and domicile is a contingency which enters into the views of the parties, and of which the wife consents to bear the risk. By sanctioning this transfer beforehand, we consent to part with the municipal governance incident to it; but with this limitation, that we part not with the remedy for past transgressions: *Barber v. Root*, 10 Mass. 265. On any other principle, an offending husband might by a change of domicile, elude the vigilance of the law; for I know not that the remedy would follow him, or that our law of divorce would be executed by a foreign tribunal even were it provided with the requisite means. No country executes the bankrupt laws of another or takes notice of a foreign revenue law; and it was aptly said in *Barber v. Root*, that the law of divorce is rather a part of the criminal than the civil code, and that it applies not so much to the contract, as to the duties, standing, and conduct of the parties in society.

It has been suggested that the validity of a foreign divorce for a cause sufficient by the *lex loci contractus*, though arising in the country of the forum, might be conceded by the English authorities, or that of any other country which assumes the prerogative of jurisdiction after emigration; but consistently with their dignity I see not how they could brook to have their peculiar laws executed by any power but their own. It is in going far beyond this, and in taking cognizance of wrongs committed beyond the limits of its territorial jurisdiction, as was done in *Ullerton v. Tewsh*, Ferg. on Marr. and Div. 55, where the desertion was in England, that the pretension of the Scottish court of sessions is most easily assailed. It follows on our own principle, however, that not only does jurisdiction belong to the

courts at the place of the domicile, but that the retribution must be meted by their measure. The appellant's case, therefore, appertains to the authorities in Ohio. The forum is there, and the law which declares the offense is there. The *locus delicti* may not be there, but the injury was suffered there. And it is conclusive that the person of the transgressor was not subject to our jurisdiction at the time of the fact; for an attempt to bind him without it, or without hearing or notice, would be extravagant. Such appears to be the law deducible from the nature of our political system; and though the earlier American cases seem to have been decided on local enactment, the doctrine here attempted to be reasoned out on principle, is fortified by precedent in *Barber v. Root*, already quoted; *Hanover v. Turner*, 14 Mass. 230 [7 Am. Dec. 203]; *Jackson v. Jackson*, 1 Johns. 424, and *Borden v. Fitch*, 14 Id. 121.¹ Our own statute declares that "no person shall be entitled to a divorce who is not a citizen of the state, and who has not resided therein one whole year previous to the filing of his or her petition or libel"—a provision manifestly intended to prevent a surreptitious use of the remedy. On general principles of law applicable to our condition, and in conformity to the spirit of our statute, the sum of the matter seems to be, that the law of the domicile at the time and place of the injury is the rule for everything but the original obligation of the marriage; and that the libel was properly dismissed for want of jurisdiction.

Order affirmed.

COURT WILL NOT GRANT DIVORCE for an offense committed without its jurisdiction: *Hollister v. Hollister*, 6 Pa. St. 451; *Gordon v. Gordon*, 48 Id. 237; *Colvin v. Reed*, 55 Id. 381. To remedy the inconvenience caused by this rule the act of April 26, 1850, granted the Pennsylvania courts authority to entertain suits for divorce for desertion, notwithstanding that the desertion occurred at a time when the married persons were domiciled within another state. But this statute, it was held, did not extend the jurisdiction to a desertion that occurred in a foreign country: 30 Id. 416, citing the principal case.

RIGHT TO A DIVORCE is regulated by the law of the domicile of the parties at the time that the alleged offense against the marital relations is committed: *Harteau v. Harteau*, 25 Am. Dec. 372. Thus, though a marriage took place in Massachusetts, no divorce can be obtained by the wife in the courts of that state, for a desertion which took place while the parties resided in New York, the laws of which state do not allow of divorces for such causes: Id. For a review of the cases upon this subject, see note to that case.

1. 15 Johns. 121; 8 C., 8 Am. Dec. 226.

WOODS v. FARMERE.

[7 WATTS, 382.]

NOTICE OF TITLE IMPARTED BY POSSESSION is restricted by the registration by the tenant of an evidence of title that would justify his possession.

PURCHASER UNDER A JUDGMENT WILL NOT BE PRESUMED to have examined the register's office for the debtor's will, and can not contend that as the terms of the will justified the tenant's possession, that possession was evidence of no further title.

NO ONE WILL BE PRESUMED TO HAVE HAD KNOWLEDGE OF THE REGISTRATION of an instrument, which could not prejudice him, as his claims are paramount thereto.

REGISTRATION BY AN EXECUTOR OF A WILL IN WHICH HE IS A DEVISEE will not operate to restrict the notice of title conveyed by his possession of the land devised, and to which he has claims paramount to those of the devisor.

WHERE AN ORIGIN OF POSSESSION IS SHOWN DURING AN ANCESTOR'S LIFETIME, no presumption of seisin by descent can be made, in order to explain the possession.

ACTUAL NOTICE OF TITLE CAN BE GIVEN by him only in whom the title is vested.

EJECTMENT. Both parties derived from John Woods, sen., father of the plaintiff. Plaintiff's title depended upon a parol purchase of the land from said John Woods, sen., in confirmation of which he had paid the purchase money, and had gone into possession. Plaintiff remained in possession of the land until 1826, when he let his mother have it. She put in possession of it a widow woman, from whom the defendants in their turn obtained possession. John Woods, sen., died in 1819, leaving a will, in which he devised the property in litigation to plaintiff, and in which he appointed plaintiff one of the executors. The will was registered. Prior to the death of John Woods, sen., a judgment was obtained against him, by one Arnold, and after his death other judgments were obtained against his executors. This tract of land was sold in order to satisfy these judgments, and the title of the purchasers at the sale was now centered in defendant. The jury was charged that the circumstances of the case were not such as to affect the purchasers under the judgment with constructive knowledge of plaintiff's equity. The other facts necessary to an understanding of the case appear in the opinion.

Shaler and Lowrie, for the plaintiff in error.

McCandless, contra.

By Court, GIBSON, C. J. The English courts give an unlimited effect to possession as an index of title. In *Douglass v.*

Whitney, and *Daniels v. Davison*, 16 Ves. 249, where the doctrine attained its maturity, it was settled that the possession of a tenant is notice of his actual interest, whether as a lessee or a purchaser. The principle may seem to have been pushed, in these instances, to the verge of propriety; yet where the occupant has not an opportunity to register his deed, or a deed to register, nothing short of it could protect him. In Pennsylvania every written title may be registered; and where an occupant announces but one of his titles, he does an act which, for its tendency to mislead, ought to postpone the other. By exhibiting a conveyance to which, by his own showing, his possession may be referred, he does what he can to turn a purchaser from the direct path of inquiry. The party for whose protection registration is intended would be more misled by the use of it than if the occupant had pointed to his possession alone, as that would have led him to a particular examination of the foundation of it; and when the occupant therefore points the attention of the public to a particular conveyance by the register, he abandons every other index. An exception to this might be the case of possession taken under a parol contract partly executed, which is not susceptible of registration; yet if it were the title mainly relied on, why register another, when, if neither were registered, the possession would be notice of both? In *Plummer v. Robinson*,¹ 6 Serg. & R. 179, the registered title was a mortgage, the other a covenant for a purchase which was susceptible of registration; and it was held, in accordance with the principle indicated, that as the possession was consistent with the registry, the subsequent purchaser was not bound to inquire further. Whether the decision would have been different had the purchase of the equity of redemption been by parol, I pretend not to say: perhaps the principle indicated would have been equally applicable to it. It is this. The tenant's possession is notice of title in every form; the registry of a particular title is notice of that alone, and would be useless for any purpose but to restrict the generality of the notice from possession. It is therefore an indication that the occupant has narrowed his general to specific notice; and were he not bound by it, he might with impunity do an act to mislead one who is presumed to have used every means of information accessible to him so far as the security of his title is concerned—but no further.

By the English principles of notice a purchaser is presumed to have known nothing which lay out of the course of his title; and

1. *Plummer v. Robertson*.

I see nothing in our registry acts by which he is presumed to have known anything which lay not in it, or was not connected with it. They raise a violent presumption that he saw all that a prudent man would see; and he is consequently presumed to have examined every perfect registry which might affect him; but no presumption beyond that can be admitted to prejudice or benefit him. Finding a conveyance on the register which may account for the tenant's possession, he may suppose the possession to be a badge of it, and seek no farther. But is a purchaser under a judgment which carries back the inception of his title to the date of the lien supposed to have searched the register's office for the debtor's will? Presumptions are founded in habitudes established by experience of the usual and natural course of things; and I know not how it could concern one purchasing paramount to the will to inquire about it. All the world is not presumed to have seen a registry or record merely because it is such, but only those whom it behooves to look at it. A purchaser is presumed to have seen the registry of a previous conveyance, because, as he might be affected by it, it would be his business to see it; and there the presumption ends; but here the purchase was of an earlier title. Moreover, though the act of 1775 declares that a deed unregistered at the end of six months shall be postponed to a subsequent deed registered before it; and though a subsequent purchaser from heirs or devisees of the first grantee is within its protection on the principle of *Powers v. McFerran*, 2 Serg. & R. 47, yet a devisee himself, standing in no higher equity than his devisor, is not. A will prevails not against an unregistered deed; and as it is unnecessary for the grantee to look at it, he is not presumed to have seen it. Extreme caution might possibly require him to follow out the course of the title in order to guard against surprise by the intervention of a purchaser from the debtor's heirs or devisees; but here it is impossible that there could be such a claimant, for the defendants are not in the category of purchasers of an unregistered title. Though a judgment creditor be not a purchaser within the recording acts, a purchaser under his judgment has all the qualities of one, by relation, from the date of the lien; and his title being thus of record, and contemporaneous with the judgment, is paramount to all conveyances or incumbrances subsequently attempted. A purchaser at sheriff's sale, therefore, having no concern with the debtor's subsequent acts, is not presumed to have been acquainted with them; and it is to be remembered that here the purchaser could have

been misled only by actual knowledge of the will: of which there was no other proof than what might be supposed to be derived from the registry of it. As to its having been a positive act calculated to deceive, it is sufficient for the argument that it may not have been a voluntary one. It was the occupant's duty, as an executor, to prove the will, even though he elected not to take under it.

The registry being out of the way, then, what have we? We have an occupancy prior in origin to the ancestor's death; and would it be reasonable for a purchaser to infer from it a seisin by descent in order to excuse him for having omitted to inquire whether it might not have originated in a purchase? It might be natural to infer a seisin by descent from an entry after the death; and it is equally natural to infer that one who entered as a tenant had not changed the quality of his possession; yet in the cases first quoted, it was held that the mere probability of a fact is not enough to relieve a purchaser from the trouble of inquiring into the truth of it. But if the presumption of seisin by descent were permitted to excuse the supineness of a purchaser in any case, it would be rebutted by the origin of a possession shown to have been in the ancestor's life-time. It is true that a father sometimes gives his son a farm as an outfit, but more usually on a contract of purchase, obliging him to pay a part of the value for owelty of partition, or to raise portions for daughters; and the exceptions to it are too few to rebut the presumption of a purchase from the possession. This presumption, as it is a wholesome one, ought not to be easily overthrown. The duty of inquiring into the foundation of a notorious possession is not a grievous one, and it is soon performed. Why, then, should a purchaser be suffered to act on probabilities as facts at the risk of any one but himself, when a moderate share of attention would prevent misconception or loss? The doctrine of constructive notice is undoubtedly a sharp one; but it is not more so in regard to a notorious possession than it is in regard to a registry. Nor is it less reasonable; for it certainly evinces as much carelessness to purchase without having viewed the premises, as it does to purchase without having searched the register. At all events, it exists here, in respect to possession, almost as fully as it does in England; and in respect to the case before us, I perceive nothing in the registry of the will, or the relation of the occupant to the decedent, which ought to restrict it.

On the point of actual notice, however, the direction is unex-

ceptionable. The witness who warned the purchasers had not an interest to entitle his warning to respect. He was the plaintiff's brother, and his own land was selling on the same execution; but neither consanguinity nor community of burden gives a right to interfere. In *Ripple v. Ripple*, 1 Rawle, 391, it was thought that an uncle might give notice as the next friend of an idiot destitute of a committee or guardian; but that was on the score of necessity; and even he was shown to have had a particular, though remote, interest of his own. In *Kerns v. Swope*, 2 Watts, 75, the English rule, that information by a stranger, or even a general claim by a party, may be disregarded, was recognized and asserted; and the law of notice would be brought to a perilous pass if it were relaxed. The purchasers, therefore, had constructive, but not actual notice.

Judgment reversed, and a venire *de novo* awarded.

NOTICE OF TITLE GIVEN BY POSSESSION is restricted by registry by the tenant of the evidence of any particular title to notice of that title: *Ebbuck v. Zimmerman*, 2 Pa. St. 317.

A PURCHASER IS NOT BOUND to search the registry for anything that lies out of the channel of his title; thus, if an absolute deed and a defeasance thereof are both recorded, he is not bound to search further than the deed: *McLanahan v. Reeside*, 9 Watts, 510; and a person is not bound to search the record to see if there is in existence any instrument to which his claims are paramount: *Martin v. Jackson*, 27 Pa. St. 509, citing the principal case.

That where anything appears of record to justify the possession it will not be evidence of anything farther, see note to *Knox v. Thompson*, 13 Am. Dec. 250.

McCULLOCH v. HUTCHINSON.

[7 WATTS, 434.]

WHERE A CONVEYANCE PURPORTING TO BE ABSOLUTE is in fact accompanied by a secret trust, that the creditor to whom it is made shall hold the property merely as security, and shall hold any balance realized after the discharge of his debt, subject to the order of his debtor, the transaction will be held fraudulent, and the conveyance void as to other creditors.

ERROR to Alleghany county. The suit was against the sheriff of the county, because of his levy of an execution issued against P. and R. Benninger, upon goods which had been, prior to the levy, transferred by the Benningers to the plaintiffs herein. The circumstances attendant upon the transfer are set forth in the opinion. The jury was instructed that the transfer was fraudulent and void. Verdict for defendant.

Shaler, for the plaintiff in error.

Metcalf and Forward, contra.

By Court, SERGEANT, J. By the statute of 13 Elizabeth, c. 5, which is in force here, and which has been considered as made in affirmance of the common law, conveyances by debtors to the end, purpose, and intent to delay, hinder, or defraud creditors in the recovery of their debts, are declared fraudulent and void as against such creditors. The statutes on this subject are liberally expounded for the protection of creditors, and to meet the schemes and devices by which a fair exterior may be given to that which is in reality collusive. The means may be varied, but the words of the law are general, and embrace them all. A bill of sale by a debtor to one preferred creditor, purporting on its face to be an absolute conveyance of the goods of the debtor at a fixed price, but in reality accompanied with a secret trust that the creditor shall hold and dispose of the goods for the discharge of a debt much less in amount, and pay over the balance to the debtor, is manifestly a contrivance by which other creditors may be hindered and prevented in the recovery of their debts. It is the secrecy of this trust, a trust incompatible with that which appears on the face of the transaction, that constitutes its illegality. When the trust openly constitutes a part of a verbal assignment, or is apparent on the face of a written instrument, no harm is done. The creditor is informed of the nature of the conveyance and of the destination of the property, so that he can with full information avail himself of his legal remedies for a resort to that surplus. No more is effected by a conveyance with such a stipulation on the face of it, than the law would annex without it; and assignments of this description were accordingly held by this court to be legal in the cases of *Livingston v. Bell*, 3 Watts, 198, and *Rahn v. McElrath*, 6 Id. 251. But there is another class of cases where the trust is secret, and the creditor liable to be misled and deceived and thrown off his guard, and the debtor enabled to collude with the assignee for the appropriation of the surplus to his private use, without fear from the interposition of the law to compel him to apply it to the payment of his other debts: *Passmore v. Eldridge*, 12 Serg. & R. 198. A preference may be given by a debtor, though insolvent, to an honest creditor. A sale may be made by such debtor at a specified price. But honesty and fair dealing require that the truth of the transaction should concur with its appearances; that the whole truth should be developed, and that the transaction should not wear the aspect of a simple sale or preference, and yet in fact be merely a disguise or color, by

means of which the debtor is enabled to enjoy a secret interest in and control over the goods and their proceeds, of which other creditors are not informed by the proceeding itself.

It is thus said by Tilghman, C. J.: "There is no intimation on the face of the deed of the reservation of any part for the benefit of the debtor: therefore, if there was any such reservation it was secret; at least it was not disclosed in such a manner that the other creditors could come to the knowledge of it by inspection of the writing. In what a situation then are they placed? If one of them lays an execution on the hides, the deed is produced by which they are protected; and yet the debtor by this private agreement is entitled to part of them. What is this but a collusion between the debtor and a preferred creditor to protect the property of the debtor from the execution of other creditors? It falls directly within the words and spirit of the statute of 13 Elizabeth:" 12 Serg. & R. 201. In the present instance the debtors were insolvent; and other creditors had obtained judgment against them, when, by an arrangement with the plaintiffs, the debtors made an absolute bill of sale in writing of their store of goods to the plaintiffs to the value of five hundred and four dollars and ninety-nine cents, purporting to be in consideration of three hundred and fifty dollars, and delivered them possession; but all this was accompanied with a private verbal understanding, that the plaintiffs were to hold them, not as their own, but in order to carry on the store and dispose of the goods, and first pay themselves the amount of the debt due to them, then amounting to but two hundred and eighty dollars, after receipt of which the balance was to be paid over to the debtors. It was while the goods were thus held under the assignment that the plaintiffs in the judgment issued their execution and sold the goods, on the ground that the conveyance was in law fraudulent and void; and we are of opinion, that the fact proved in the case, and which is uncontroverted, of the existence of this private arrangement, renders the transaction a fraud *per se*; that it is a conveyance to the end, purpose, and intent to hinder and prevent creditors within the words and meaning of the statute of Elizabeth; and that there was no error in the court below charging the jury to that effect.

Judgment affirmed.

A FRAUDULENT ASSIGNMENT can not be attacked by a party thereto or his assignee: *Carey v. Bright*, 58 Pa. St. 85.

RICHART v. SCOTT.

[7 WATTS, 460.]

A WALL BUILT TO THE DIVIDING LINE OF ADJACENT LOTS must be built of such materials and in such manner that the owner of the adjacent lot may excavate with safety the contiguous earth, and dig below it if it become necessary to do so, when he desires to build; and if any damage occur to the wall from such excavations, which are made with reasonable care and diligence, they must be borne by the owner of the wall.

PRESCRIPTIVE RIGHT CAN NOT BE ACQUIRED FROM A USER to which the owner of the property over which the right is claimed could not have objected.

CASE, to recover for the damage occasioned to a building of which plaintiff was in possession, by excavations made by defendant upon the adjacent lot. The excavations appeared to have been made with reasonable care and diligence. The wall of plaintiff's building was built on the line dividing the lots. The jury was instructed that plaintiff was not entitled to a recovery.

Mahon and Williamson, for the plaintiff in error.

Shaler, contra.

By Court, KENNEDY, J. The first error assigned here has been abandoned. The second presents the principal question; and one which, on account of its connection with almost daily occurrences in our state, more especially in our improving cities and towns, is therefore of some interest, and requires a distinct expression of opinion from this court in regard to it: so that all concerned in the erection of new buildings may know what they are bound to do, as well in justice to themselves as to others; and how to govern themselves in such manner as to avoid incurring losses happening thereafter to themselves, from want of attention and skill to construct their walls properly; and also to avoid committing injuries upon the rights of their neighbors through ignorance of the law in relation to this subject. It can not be doubted, but the respective owners of adjacent lots of ground, situate in cities or towns, and laid out and sold by the original owner of the whole ground plot for the very purpose of being improved by the erection of buildings thereon to the utmost boundaries thereof, have the right to do so whenever it may suit their ability and convenience; and are not bound to do anything of the kind before, unless, indeed, an express condition requiring it be annexed to the grant from which the title is derived.

The counsel for the plaintiff seem to entertain the idea that the owner of a lot can only build to the line between him and the owner of the adjacent lot, where it is practicable to do so without producing any damage or loss to the latter, though the latter or those under whom he claims may have been in a great degree the occasion of its being impracticable for the former to build without such loss happening to the latter.

Now although the rule of the civil law, *sic utere tuo ut alienum non lædas*, has been adopted and become part of the common law, yet it will not secure and protect every reckless and careless owner of property, who has, through want of proper care and attention on his part, or of those under whom he claims, been the occasion of the loss complained of. The owner of the lot, who improves it by putting up a dwelling or other house thereon, extending to the boundary of the same, which is a mere line of length without breadth separating his lot from the adjacent one belonging to another and remaining unimproved, must be considered as bound to use suitable materials and the requisite skill in doing so, in order that the walls of his building next to the adjacent lot may, if the owner thereof should think proper, in preparing the foundation for the house which he may afterwards resolve on erecting, to excavate the adjacent earth or to go below the foundation of the walls of the first building, admit of its being done by ordinary care and caution, with the use of the common and ordinary means of accomplishing it. If the first builder, in the construction of his wall, use materials unfit for the purpose; or the materials, though suitable, are so unskillfully built in the wall, that it can not be preserved and supported by ordinary care and diligence, with the use of the usual and ordinary means resorted to in practice for that purpose: when the second builder comes to dig out the foundation for his house, but notwithstanding the use of such care, diligence, and means by the latter to prevent it, the wall gives way and with it a part, or the whole, of the first building falls, occasioning small or great loss to the owner thereof, it must be regarded as *damnum sine injuria*, for which the second builder is in no wise responsible. This would seem to be the doctrine laid down by the learned judge of the district court to the jury on this subject; which we entirely approve, as being the law of the land, and the only rational rule applicable to such cases. It was contended, however, that inasmuch as the plaintiff's house had been built upwards of twenty-one years before the defendant undertook to erect his and to make the excavation preparatory to that end, that the plaintiff by

the lapse of this time acquired a right to have his house maintained and preserved in the same relative state in which it stood during that period to the earth and soil of the defendant's lot, unless the removal of the adjacent earth on the defendant's lot could be effected, at any cost or expense, however great, without any damage arising therefrom to the plaintiffs; and that the latter, in short, had no right to put a spade into his lot, no matter how great the degree of caution and care might be that should be used with a view to prevent damage accruing to the plaintiff in his house, without becoming absolutely liable to the former for the loss that might ensue thereon. This right seems to be claimed, on behalf of the plaintiff, upon the ground of an implied assent given thereto on the part of the holders of the lot on which the defendant was at work when the occurrence complained of took place, that the plaintiff should have and enjoy it. It is true that a license or grant by the owner of property to another to use it for a particular purpose, or in a particular way, may be implied or presumed from the adverse enjoyment of it by the latter for twenty-one years, and perhaps less time in some instances, accompanied by an acquiescence therein during the same period by the former. But it is difficult, if not impossible, to conceive how an implication or presumption of such license or grant can be made, where there is no adverse user, encroachment upon or possession had or taken of any right or thing belonging to another, and nothing done to which any other can make even the slightest color of objection. That it can not be is a principle laid down very fully, and clearly illustrated by Mr. Justice Rogers in declaring the opinion of this court in *Hoy v. Sterrett*, 2 Watts, 327 [27 Am. Dec. 313].

In the present case it is certain and perfectly clear that the plaintiff never had the use or was in the possession or enjoyment of any right whatever, corporeal or incorporeal, belonging at any time to the defendant or the owners of the lot whereon the act complained of was done, either as forming a part of it or in any way appurtenant to it: the plaintiff had an absolute right from the first to build on and use his lot to the utmost extent of his boundaries; he did so, but went no further: of course the defendant, or the owners of the lot whereon he was employed to build, could make no objection to the plaintiff's building as he did; it would therefore be a misuse as well as abuse of the terms "license," "grant," and "acquiescence," to say the plaintiff has acquired a right by means thereof from the defendant or the owners of the lot, seeing he never had the use or possession

of more than his lot and what properly belonged to it, which the defendant or the owners of his lot had no right whatever to object to. The plaintiff's claim, then, in this respect, if it means anything at all, amounts to this, that having erected his house upwards of twenty-one years before the defendant commenced his building, he thereby not only became discharged from the duty which he owed to himself, perhaps exclusively it may be said, to have built the wall of his house adjacent to the lot of the defendant of sufficient materials and in a workmanlike manner, but actually, as it would seem, threw off the responsibility resting upon himself in regard to it, and the loss arising therefrom on account of his own neglect to do so, upon the defendant or the owner of the lot adjoining where the defendant was employed to build. The absurdity as well as injustice of this is too apparent to be maintained for a moment. Besides, it would be contrary to the very spirit of the rule, whereon the plaintiff measurably professes to rely for a recovery against the defendant, *sic utere tuo ut alienum non lædas*. Because the plaintiff under the operation of this rule, though he had a right to build and improve to the utmost verge of his lot, still he was bound in fairness towards the owner of the adjacent lot to do it in such a way as not to create unnecessarily any additional labor and expense to the latter when he should thereafter come to improve his lot by building upon it, beyond what would have been requisite in case of the plaintiff's being done in a skillful and workmanlike manner of fit materials. But if the plaintiff, because he built first, is to be relieved from the responsibility of having constructed the walls of his house adjoining to the ground and lot of the defendant with sufficient materials or in a skillful manner; and the loss attending its being done otherwise is to fall upon the defendant when he comes to build afterwards, though it should happen to be after a lapse of twenty-one years or more, it would be highly unreasonable and unjust. Because the consequence of it to the defendant may be in order to build up to his line adjoining the plaintiff, which he has an indubitable right to do, and to effect this without occasioning loss to the latter, that he will be compelled to undergo the labor and expense of gradually removing the plaintiff's wall, and at the same time accompanying this operation with the rebuilding of it of new suitable materials in a skillful manner: thus incurring an expense that may exceed by tenfold what would have been requisite if the plaintiff had constructed his wall as it ought to have been; and incurring also at the same time the risk of being sued as a tres-

passer for having entered on the plaintiff's lot without his license in order to remove and rebuild his wall. In truth, it is most obvious that such a principle, when carried out, may go to exclude the owner of a lot in a situation similar to that of the defendant from building on it altogether; which would be inconsistent with principles of sound policy as well as of law and natural justice. The defendant, or owner of the lot by whom the defendant was employed to build upon it, could not object to the plaintiff or the builder of his house constructing the walls of it as he pleased, either in a skillful or unskillful manner; this was entirely within the discretion and control of the latter: hence it would be most unreasonable to make the defendant not only suffer for the neglect or fault of the plaintiff, but to make good to the plaintiff the loss arising therefrom. It is obvious, therefore, that in such cases, the first builder, and indeed every builder, ought, in putting up his house, to do it in such a manner as to impose no unnecessary expense or burden thereafter upon the owner of the adjacent lot, when he shall come to build upon it or to alter and remodel that which he may have put on it previously. If this rule, however, be disregarded by anyone to whom a loss accrues in consequence thereof by the falling of his wall or of his house when the owner of the adjoining lot comes to build thereon, and he comes into court claiming to make the latter answerable for it, it can not be that he is entitled to recover.

Being of opinion that the charge of the court to the jury was correct on this question, and the jury having found the facts to be in favor of the defendant so far as they related to it, the direction of the court to the jury on the measure and extent of damages that ought to be given to the plaintiff in case they should find a verdict in his favor, and which is made the ground of the third error assigned, does not necessarily require to be noticed. But it may not be improper to say that we perceive no error in the direction of the court on this point either.

Judgment affirmed.

MCGEE v. CAMPBELL.

[7 WATTS, 545.]

FRAUDULENT CONVEYANCE IS GOOD except as against the grantor's creditors. CREDITORS OF A FRAUDULENT GRANTOR can not seize the property conveyed, otherwise than by virtue of process the authority of which extends to the place in which the property is found.

TRESPASS vi et armis. Richard Wolverton, with intent to defraud his creditors, transferred two horses to McGee. McGee removed the horses to Clearfield county. Afterwards, Campbell obtained a judgment against Wolverton before a justice of the peace of Jefferson county. Execution issued upon the judgment to Smith, who thereupon went into Clearfield county with Campbell, and took the horses from McGee's possession. The jury was instructed that the transfer conveyed no right of property to plaintiff and that he could not recover.

McCalmont, for the plaintiff in error.

Buffington, *contra*.

By Court, KENNEDY, J. The sale of the property in question by R. Wolverton to McGee, the plaintiff, was most probably made for the purpose of preventing the creditors of Wolverton from enforcing the payment of the debts due to them; and was therefore no doubt void as against them. But it was not only good and binding as against the parties, that is Wolverton and McGee, but likewise against all the rest of the world, excepting the creditors of Wolverton. Notwithstanding, however, it was void against them, still they could not seize or take the property wherever they happened to meet with or find it, unless under legal process giving and extending an authority to the place to do so. Campbell, one of the defendants, it is true, had obtained a judgment against Wolverton before a justice of the peace in Jefferson county, upon which an execution had been sued out directed to Smith, the other defendant, and was in his hands at the time that he and Campbell took the property. But this execution did not authorize Smith to go beyond the limits of the county to seize property under it. If he went out of the county of Jefferson, where the justice resided before whom the judgment was obtained and from whom the execution was issued, it was the same out of the county as if he had no process whatever in his hands against Wolverton. Having no authority, then, to take the property except in Jefferson county, it follows of course, and necessarily too, that he became a trespasser in taking it in Clearfield county. Campbell had no authority, and could not have justified himself for having touched the property, except it had been to have assisted Smith, upon his request, in Jefferson county, had the property been found there, where Smith himself would have been justified in taking the property by virtue of the execution in his hands. Smith and Campbell were then both trespassers here.

The question next presents itself, seeing a trespass was committed, against whom or upon whose rights was it committed? If Wolverton had not parted with his right in the property to McGee, it is perfectly clear that, as the owner of it, he might have maintained an action of trespass against the defendants for having taken it; but having previously sold and transferred all his right therein to the plaintiff here, it is equally clear that he could maintain no such action, because, as against him, the transfer is perfectly good and available. Upon it, if he were in the possession of it, and should attempt to withhold it from the plaintiff against his consent, the latter might recover it from him. This being the case, what is there, then, to prevent the plaintiff from maintaining the action? He is invested with the same right to the property that Wolverton would have had, provided he had not sold to the plaintiff: consequently the latter may maintain this action. No plausible objection can be made to his doing so. For although the sale and transfer of the property by Wolverton to the plaintiff may be, and doubtless is, void against the creditors of the former, because made for the purpose or with a view to hinder, delay, or defraud them in the collection of their debts, yet they have no right to meddle with or take it, unless they will come armed with the authority of the law for that purpose. The court below seem to have entertained the idea that if the sale to the plaintiff was fraudulent it was therefore void to all intents and purposes against all the world, and that no right of property whatever became vested in the plaintiff by it. This, however, is not the case, because it is good and available against everybody and for every purpose, except as against the creditors of Wolverton, and even as against them it is sufficient to protect the plaintiff in the possession and the enjoyment of it, until they shall take it by virtue of legal process suited to that end. The court below therefore erred in directing the jury that it did not alter the case, even if the property were taken by the defendants in Clearfield county; and that the plaintiff could not recover in this action, if they found the sale to the plaintiff to be fraudulent, whether the property was taken in Jefferson or Clearfield county.

Judgment reversed, and a *venire de novo* awarded.

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3. SUMS DUE ON A CURRENT OR BOOK ACCOUNT constitute one entire, indivisible demand. *Id.*
4. SEPARATE ACTIONS MAY BE SUSTAINED for each of several separate, independent injuries or wrongs. *Id.*
5. ONE ACTION ONLY MAY BE MAINTAINED for demands already due in the same contract, as for damages arising from a single wrong, although such demands may have fallen due or such damages have developed at different times. *Id.*

See ASSIGNMENTS OF CONTRACTS, 4; ASSUMPSIT; ATTACHMENT, 5; CASE; CONSTITUTIONAL LAW, 10; CORPORATIONS, 9-11; CO-TENANCY, 3; EMINENT DOMAIN, 6; EJECTMENT; EXECUTIONS, 3; NEGOTIABLE INSTRUMENTS, 5; PARTNERSHIP, 3; SLANDER, 1; TRESPASS; TROVER.

ADMINISTRATION BOND.

See SURETYSHIP, 8-10.

ADMIRALTY.

1. JURISDICTION IN PERSONAM as well as in rem is vested in the maritime courts of the United States. *Case v. Woolley*, 54.

2. **THOUGH A LIBEL FILED BE NOT FOR A MARITIME LIEN**, and therefore not sufficient to give the admiralty court jurisdiction, such court will acquire jurisdiction if another libel, filed by an intervening party, be for a maritime claim. *Id.*
3. **AN ACCOUNT FOR SUPPLIES FURNISHED A VESSEL** at a place where the tide ebbs and flows is a maritime claim. *Id.*
4. **A MARITIME CLAIM FOR SERVICES** must show that such services were wholly or essentially performed where the tide ebbs and flows. *Id.*

See JURISDICTION, 6-8.

ADULTERY.

1. **ADULTERY AT COMMON LAW** can be committed only upon the person of a married woman; illicit carnal intercourse by a married man with a woman not married, is not sufficient to constitute this crime. *State v. Lusk*, 397.
 2. **THE COMMON LAW IS THE CONSTITUTIONAL GUIDE** of this court in determining what constitutes adultery, and in case of a conflict between it and the canon law, the former will prevail. *Id.*
 3. **ON INDICTMENT FOR ADULTERY** defendant can not be found guilty of fornication. *Id.*
 4. **ADULTERY AS USED IN THE STATUTES** of Massachusetts, includes the act of a married man having sexual intercourse with an unmarried woman. *Commonwealth v. Call*, 234.
 5. **JOINT INDICTMENT FOR FORNICATION AND ADULTERY**, which charges an unlawful bedding and cohabiting together, describes the offense sufficiently, and the charge is sustained by showing a habitual surrender of the person of one for the gratification of the other. *State v. Jolly*, 656.
- See JURISDICTION, 10; MARRIAGE AND DIVORCE, 1-4; WITNESSES, 4-6.

ADVERSE POSSESSION.

See LANDLORD AND TENANT, 1, 2.

AGENCY.

1. **AGENT ENTRUSTED, FOR COLLECTION, WITH A DRAFT OR BILL PAYABLE ON A PARTICULAR DAY**, is liable for any unnecessary delay in presenting it for acceptance, although it may not be yet due. *Allen v. Gaydam*, 555.
2. **DAMAGES RECOVERABLE OF AN AGENT FOR FAILING TO PRESENT A BILL OR CHECK FOR ACCEPTANCE** or payment, do not extend beyond the actual loss occasioned by such failure. If none of the parties were released from liability by the neglect of the agent, nominal damages only are recoverable from him. *Id.*
3. **TO RECOVER OF AN AGENT THE WHOLE AMOUNT** of a bill or draft, because of his neglect to present it for acceptance or payment, the plaintiff should at least prove a state of facts from which it appears probable that such neglect had caused damage to such amount. *Id.*
4. **DAMAGES TO THE AMOUNT OF THE BILL OR DRAFT** are, *prima facie*, recoverable if the neglect of the agent to present it for payment or acceptance has discharged a drawer or indorser who was apparently able to pay it, unless he is able to show, notwithstanding, that the whole amount of the bill has not been lost by such negligence. *Id.*

5. **DECLARATIONS OF AN AGENT WHILE ACTING AS SUCH** and within the scope of his authority are evidence against his principal. *Stockton v. Demuth*, 735.

See **COMMON CARRIERS**, 11, 16; **JUDGMENTS**, 15; **NOTICE**, 8; **SHIPPING**, 15.

ALIMONY.

See **MARRIAGE AND DIVORCE**, 5.

AMENDMENT.

See **PLEADING AND PRACTICE**, 1, 9; **PROCESS**, 5.

ANCIENT LIGHTS.

See **EASEMENTS AND SERVITUDES**, 9; **INJUNCTIONS**, 2.

APPEALS.

See **COSTS**; **SURETYSHIP**, 11.

APPURTENANCES.

See **DEEDS**, 1-4.

ARBITRATION AND AWARD.

1. **ARBITRATION.**—**SUBMISSION ATTEMPTED TO BE MADE** under the provisions of the statute, and providing that judgment thereon be entered in the court of common pleas, if inoperative as a statutory, is not valid as a common law submission to arbitration. *Inhabitants of Deerfield v. Arms*, 228.
2. **AN AWARD IS NOT INVALID BECAUSE UNJUST** or contrary to law. *Curd v. Wallace*, 85.
3. **AN AWARD UPON MATTERS NOT SUBMITTED** is void. *Id.*
4. **AN AWARD WHICH IS REPUGNANT** is invalid, as where arbitrators, authorized to determine whether B. has a right to the use of a meeting-house with A., first decide that neither party has any right to the property, and then that each party shall enjoy an equal use alternately. *Id.*

ASSAULT AND BATTERY.

See **CRIMINAL LAW**, 1, 2.

ASSESSMENT.

See **TAXATION**.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

1. **ONE OF SEVERAL ASSIGNEES** may demand or receive a debt on behalf of all. *Heard v. Lodge*, 197.
2. **OBJECTION THAT A DEMAND IS MADE AT AN IMPROPER TIME OR PLACE** is waived if not taken at the time, and especially if it is met by an unqualified refusal. *Id.*
3. **WAIVER OF DEMAND** takes place when the party entitled to it shows that it would be disregarded or would prove useless. *Id.*

ASSIGNMENTS OF CONTRACTS.

1. DRAFT BY A CREDITOR TO THE AMOUNT OF THE WHOLE DEBT, is valid as an assignment thereof. *Gibson v. Cooks*, 194.
2. AN ASSIGNMENT OF OR ORDER TO PAY PART OF A DEBT OR FUND is inoperative and invalid unless assented to by the debtor; and without such assent no action can be maintained against him thereon. *Id.*
3. ASSIGNEE OF NON-NEGOTIABLE CHOSEN IN ACTION takes it subject to all the legal and equitable defenses of the obligor or debtor, to which it was subject in the hands of the assignor. *Jones v. Hardesty*, 180.
4. ASSIGNEE OF THE INTEREST OF A JOINT PAYEE OF A NEGOTIABLE NOTE acquires by the assignment no right of action at law in his own name. In case of such partial assignments, the collection of the note must be enforced by an action in the name of the original payee. Nor does it affect the rule that the assignee is himself the other payee of the note. *Miller v. Bledsoe*, 37.

See JURY, 1; MORTGAGES; TENDER, 1.

ASSUMPSIT.

1. ASSUMPSIT FOR MONEY HAD AND RECEIVED can not be maintained to recover the amount of a reward due the plaintiff, against the person to whom such reward, through fraud or mistake, has been wrongfully paid. *Sergeant v. Stryker*, 404.
2. THERE MUST BE SOME PRIVITY existing between the parties in relation to the money sought to be recovered, in order that assumpsit may be maintained. *Id.*
3. MONEY SOUGHT TO BE RECOVERED upon an implied promise, must, in this action, be either the identical money previously in the possession of plaintiff, or the proceeds of some property to which the plaintiff is entitled. *Id.*
4. ASSUMPSIT FOR USE AND OCCUPATION can be maintained only where it is founded upon a contract express or implied. *De Young v. Buchanan*, 156.

See ACTIONS, 2; JURISDICTION, 9.

ATTACHMENT.

1. ATTACHMENT HAS NO VALIDITY, under the act of 1795, c. 56, unless there be issued with it a *capias* against the defendant, and a declaration or short note stating the plaintiff's cause of action be filed, and a copy thereof sent with the writ; to be set up by the sheriff at the court-house door. *Stone v. Magruder*, 177.
2. GARNISHEE MAY RAISE THE OBJECTION that the *capias* was not issued, nor the short note set up, as required by the statute; and he may do so even after he has pleaded to the attachment and issue has been joined on his pleas. *Id.*
3. JUDGMENT IN THE COUNTY COURT WILL BE ARRESTED for any substantial defect in the proceedings by attachment under this law. *Id.*
4. RETURN OF AN OFFICER showing that he has attached land "supposed" to belong to the debtor, does not impair the effect of the attachment, if the land in fact is the property of the debtor. *Banister v. Higginson*, 134.
5. PARTY HAVING RIGHT OF ACTION AGAINST OFFICER FOR ATTACHING PROPERTY by law exempt from seizure, does not lose or waive such right by

merely declaring to a third person that he did not care for the things taken by the sheriff, that the creditor might have them and welcome, but that he would take good care that he got no more, where no consideration was paid by the creditor or officer, and neither of them had, at the time, any knowledge that such declaration had been made; nor does it make any difference that the creditor afterwards heard of the declaration, and in consequence proceeded to sell the property attached, especially when such sale was made after the debtor brought his action. *Rice v. Chase*, 346.

See CONSTITUTIONAL LAW, 3; CONTRACTS, 2.

ATTORNEY AND CLIENT.

1. UNAUTHORIZED APPEARANCE OF ATTORNEY, and confession of judgment by him, is not sufficient ground for impeaching such judgment in a court of equity. *Fowler v. Lee*, 172.
2. ATTORNEY AT LAW HAS POWER TO INSTITUTE ALL PROCEEDINGS required to make effectual a judgment obtained by him. He may, therefore, demand payment of such judgment of an administrator, pursuant to sec. 3, c. 70, of the revised statutes. *Heard v. Lodge*, 197.
3. AN ATTORNEY WHO, WHILE HOLDING A MORTGAGE upon certain premises, is employed by the mortgagor to draw a deed and assist in conveying a part thereof to a third person having no knowledge of such mortgage, and who pays full value therefor, and from whom the existence of such mortgage is concealed, will not be permitted in equity to enforce the lien of his mortgage against the part of the premises conveyed to such purchaser. *L'Amoureux v. Vandenburg*, 636.

AWARDS.

See ARBITRATION AND AWARD, 2, 3, 4.

BANKRUPTCY AND INSOLVENCY.

See DOMICILE, 1; SALES, 10.

BANKS AND BANKING.

See CONSTITUTIONAL LAW, 1, 2, 4-8.

BASTARDS.

See PARENT AND CHILD.

"BEYOND SEA."

See STATUTE OF LIMITATIONS, 7.

BILLS OF LADING.

See SHIPPING, 11-14.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENTS.

BONA FIDE HOLDER.

See NEGOTIABLE INSTRUMENTS, 3.

BONA FIDE PURCHASERS.

See ATTORNEY AND CLIENT, 3; ESTOPPEL, 3; EXECUTIONS, 15; SALES, 4-9, 12.

BONDS.

1. DELIVERY OF A BOND MAY BE COMPLETED WITHOUT ANY PARTICULAR FORM, and the intention to make such delivery inferred from the conduct or language of the party at the time. *Blackwell v. Lane*, 675.
2. BOND SUBSCRIBED BY WITNESS WITHOUT KNOWLEDGE OR CONSENT OF OBLIGOR is not on that account rendered void in law. *Id.*
3. BOND EXECUTED BY A DEBTOR TAKEN UNDER PROCESS OF EXECUTION, to secure his release, and conditioned for his appearance at the commencement of a subsequent term of court to be held on a particular day, is fully performed if the person by whom it is given appear upon the particular day named in the condition, notwithstanding the term of court specified may have commenced at a day previous. *Winslow v. Anderson*, 651.

See ESTATES OF DECEASED PERSONS, 1; SURETYSHIP, 8-15.

BOUNDARIES.

1. A PERFECT DESCRIPTION BY MONUMENTS, COURSES, and distances can not be limited by the words "containing two hundred acres and no more." *Jackson v. McConnell*, 439.
2. ACQUESCENCE IN A BOUNDARY LINE is evidence of an agreement to abide by it, and, if continued sufficiently long to give title by prescription, is conclusive evidence. *Id.*
3. MORE OR LESS.—If, in a deed, a lot be described as running back eighty-five feet, more or less, these words may be deemed to have some meaning, so as not to fix the distance absolutely; and if the grantor soon afterwards makes and records a plat, in which the lot before granted is shown to be eighty-nine feet in depth, this is equivalent to fixing the back line eighty-nine feet from the front, and is conclusive upon him and those thereafter acquiring title under him. *Blaney v. Rice*, 204.
4. DESCRIPTION CONTAINED IN A DEED calling for a marked line along a river is construed to have relation to the natural object which is the more important description, and the course of the stream will control the marked line, the former being in law the true boundary. *Lynch v. Allen*, 671.
5. DEED DESCRIBING A BOUNDARY AS FOLLOWING THE COURSE OF A RIVER, preserves the boundary as it was at the time of the execution of the deed, and is not changed by excessive floods causing such stream to desert its bed and producing violent and visible alterations in its course. *Id.*
6. A WALL BUILT TO THE DIVIDING LINE OF ADJACENT LOTS must be built of such materials and in such manner that the owner of the adjacent lot may excavate with safety the contiguous earth, and dig below it if it become necessary to do so, when he desires to build; and if any damage occur to the wall from such excavations, which are made with reasonable care and diligence, they must be borne by the owner of the wall. *Richard v. Scott*, 779.

7. **PRESCRIPTIVE RIGHT CAN NOT BE ACQUIRED FROM A USER** to which the owner of the property over which the right is claimed could not have objected. *Id.*

See DEEDS, 2.

CASE.

CASE IS THE PROPER REMEDY WHERE THE INJURY IS CONSEQUENTIAL and not immediate, and also even where the injury is immediate, if the act causing it be alleged as a consequence of negligence or inattention. *Dodson v. Mock*, 677.

See CO-TENANCY, 3; EXECUTIONS, 3; HIGHWAYS.

CHARITABLE USES.

1. **STATUTE OF ELIZABETH RELATIVE TO CHARITABLE USES** was never acted upon in New York; but courts of chancery independent of such statute had an original jurisdiction to enforce and compel the execution of such trusts. *Reformed Protestant Dutch Church v. Mott*, 613.
2. **CONVEYANCE TO CERTAIN INDIVIDUALS**, of the site of the Dutch church in Garden street, in the city of New York, in 1691, in trust for the use of the ministers, elders, and deacons of such church, and their successors, and for no other purpose, was a valid conveyance to a charitable or pious use at the common law, and vested the legal title to the premises in the trustees absolutely and irrevocably, for the uses therein declared. *Id.*
3. **WHERE REAL ESTATE IS CONVEYED TO trustees** for the use of a church or congregation as a place of worship, and such church or congregation is afterwards incorporated, to enable the corporation to take and hold the legal title, it will be presumed, after a great lapse of time, that there was a conveyance of the legal title from the trustees to the corporation. *Id.*
4. **THE DEDICATION OF A MEETING-HOUSE CREATES A CHARITABLE USE** in favor of the beneficiaries, over which chancery will exercise jurisdiction to maintain the trust and to enjoin invasions thereof. *Curd v. Wallace*, 85.

See CORPORATIONS, 5, 6.

CHECKS.

See NEGOTIABLE INSTRUMENTS, 15-20, 22.

CHILDREN.

See WILLS, 3.

CLERK.

See MASTER AND SERVANT, 6.

COMMON CARRIERS.

1. **FOR INJURY TO A PASSENGER, STAGE-COACH PROPRIETORS** are liable only for want of proper care, diligence, and skill. *Hollister v. Nowlen*, 455.
2. **OF BAGGAGE STAGE-COACH PROPRIETORS ARE INSURERS**, and are answerable for any loss not resulting from public enemies or inevitable accident: the presence of the owner or his sending his servant to look after the property does not constitute an exception to the rule, there being no fraud on the part of the owner. *Id.*

3. GENERAL NOTICE LIMITING CARRIER'S RESPONSIBILITY TO A SUM DEMONSTRATED, unless he shall be advised of the goods being of greater value, and compensated accordingly, is effectual for his protection. *Per Cowen, J. Cole v. Goodwin, 470.*
4. COMMON CARRIER IS A PUBLIC SERVANT charged with certain duties and subject to certain responsibilities; and, receiving the reward of a common carrier, he can not by notice to, nor by the express agreement of, his customer, absolve himself from liability for the loss of the property intrusted to him, there being no fraud or misrepresentation on the part of the customer. *Per Cowen, J. Id.*
5. NOTICE THAT BAGGAGE WOULD BE AT THE RISK OF THE OWNER, printed and placarded at the public offices of a stage company, will not limit its liability as a common carrier. *Hollister v. Nowlen, 455.*
6. COMMON CARRIER CAN NOT REJECT OR RECEIVE a customer at pleasure. *Id.*
7. CARRIER'S LIABILITY IS DETERMINED BY THE POLICY OF THE LAW, and he is liable independent of his contract. *Id.*
8. FALSE ANSWER AS TO VALUE OF GOODS INTRUSTED TO A COMMON CARRIER is a fraud upon him, and may exonerate him from making good a loss not chargeable to his neglect or misconduct. *Id.*
9. GENERAL NOTICE THAT CARRIER WILL NOT BE RESPONSIBLE for baggage does not restrict his liability, nor does it create a presumption of an implied contract not to hold him answerable for baggage. *Id.*
10. FOR THE BAGGAGE OF PASSENGERS COACH PROPRIETORS are answerable as common carriers; and they can not avoid their liability by a general notice, brought home to their customers. *Cole v. Goodwin, 470.*
11. STAGE-COACH PROPRIETOR CARRYING A PASSENGER TO A PARTICULAR PLACE, must leave his baggage there without request from the passenger, and is liable for taking it beyond, although the agents of the stage have failed to book or way-bill it, or to put any mark upon it to show where it is to be delivered. *Id.*
12. USAGE OF STAGE-COACH PROPRIETORS NOT TO REMOVE BAGGAGE at a town where they did not change coaches, unless requested by the passenger, will not relieve them from liability in not removing a trunk at such place, the passenger not being shown to have any notice of such usage. *Id.*
13. COMMON CARRIER OF BAGGAGE IS ANSWERABLE for all loss not occasioned by act of God or public enemies, although the owner accompanies the property. *Id.*
14. COMMON CARRIER IS BOUND TO RECEIVE PASSENGERS AND GOODS, if he have room, and transport them for a reasonable compensation. *Id.*
15. COMMON CARRIER CAN NOT EXONERATE HIMSELF, by special agreement or otherwise, from the consequences of gross neglect. *Id.*
16. SPECIAL AGREEMENT will not protect carrier against the consequences of the malfeasance or misfeasance of himself or his servants. *Id.*
17. CARRIERS MAY LIMIT THEIR LIABILITY to a specified sum, unless the goods are entered and paid for according to their value. *Per Cowen, J. Id.*
18. OWNER OF PROPERTY INTRUSTED TO A CARRIER must act in good faith, and, if he speak at all, give a correct account of all material circumstances within his knowledge, material to the risk taken by the carrier. *Per Cowen, J. Id.*

COMPENSATION.

See EMINENT DOMAIN, 5; IMPROVEMENTS.

CONCEALMENT.

See INSURANCE—FIRE; MORTGAGES.

CONDITIONAL SALES.

See VENDOR AND VENDEE, 4.

CONFESSIONS.

See JURY, 2; MARRIAGE AND DIVORCE, 1, 2, 4.

CONFLICT OF LAWS.

1. A STATE WILL NOT ENFORCE CONTRACTS MADE ELSEWHERE by its citizens, if they are in violation and fraud of its laws. *Hinds v. Brasealle*, 307.
 2. TITLE TO REAL PROPERTY, and the validity or invalidity of a devise or conveyance thereof, depends upon the *lex loci rei sita*. *Hawley v. James*, 623.
 3. WHERE A DEVISE OF REAL ESTATE UPON TRUST can not be carried into effect according to the intention of the testator, and is valid by the laws of the state where the property is situated, the courts of the state where the trustees are found may direct them to carry the will of the testator into effect, although such a devise of real property, situated in that state, would not be valid. *Id.*
 4. REGULARITY OF PROCEEDINGS BY WHICH PERSONAL PROPERTY IS ATTACHED and sold under execution, is to be determined by the laws of the state in which such proceedings are had. *French v. Hall*, 341.
 5. VALIDITY OF SALE OF PERSONAL PROPERTY depends upon the laws of the government where it is made and the property delivered. *Id.*
- See EXECUTORS AND ADMINISTRATORS, 4, 5, 9, 10, 15; MARRIAGE AND DIVORCE, 6-8.

CONSIDERATION.

See CONTRACTS, 2; DEEDS, 10; EVIDENCE, 1; NEGOTIABLE INSTRUMENTS, 9.

CONSTITUTIONAL LAW.

1. BANK COMMISSIONERS.—Statute 1838, c. 14, which provides that bank commissioners shall be appointed by the governor, that they shall visit the banks and shall have free access to their vaults, books, and papers, and shall make all such inquiries as may be necessary to ascertain the condition of the banks, and their ability to fulfill their engagements, and whether they have complied with the provisions of law, and may summon and examine under oath, the officers and agents of the banks, in relation to the transactions and condition of the bank, and that an officer or agent who shall refuse "without justifiable cause," to appear and testify when thereto required, shall be subject to fine and imprisonment; and if upon an examination of any bank they shall be of opinion that it is insolvent, or that its condition is such as to render its further progress hazardous to the public, and that it has exceeded its powers or has failed to comply

with all the rules, restrictions, and conditions provided by law, they may apply to a justice of the supreme judicial court, to issue an injunction to restrain such corporation, in whole or in part, from further proceeding with its business, until a hearing of the corporation can be had, and the justice shall forthwith issue such process, and after a full hearing of the corporation upon the matters aforesaid, may dissolve or modify the injunction or make it perpetual, and, at his discretion, appoint a receiver, is not unconstitutional. *Commonwealth v. Farmers' and Mechanics' Bank*, 290.

2. SUCH STATUTE IS NOT UNCONSTITUTIONAL because it usurps judicial power in requiring the justice, in the first instance, on the complaint of the bank commissioners, without the hearing of evidence to satisfy his mind, to issue an injunction; because it in effect declares that the representations of such commissioners made upon such examination, and of such facts, shall be *prima facie* evidence that the bank is acting unlawfully, and its further operations will be dangerous to the community. *Id.*
3. SUCH REPRESENTATIONS MADE BY SUCH OFFICERS in the manner provided by such statute, are entitled to fully as much credit as an affidavit would be, for the purpose of obtaining an attachment on meane process or a *distringas*, or a sequestration. *Id.*
4. SUCH JUSTICE, IN THE ISSUANCE of the preliminary injunction required by such statute, exercises judicial powers in determining that the complainants are the bank commissioners; that they have examined the bank complained against in the manner required; that it is insolvent, or that its further proceeding is dangerous to the public; and that the application is made in the form required. *Id.*
5. A JUDICIAL DISCRETION IS ALSO EXERCISED by the justice in determining upon the complaint of the commissioners, to what extent the preliminary injunction shall go; whether to entirely or only partly suspend the operations of the bank. *Id.*
6. SUCH STATUTE IS NOT OPEN to the objection that it compels the officers and agents of a bank to furnish evidence which may criminate themselves, because it only allows a penalty to be imposed upon those who, "without justifiable cause," shall refuse to appear and testify; and if they should refuse to testify because their evidence would criminate themselves, that would be a justifiable cause, and consequently no penalty could be imposed. *Id.*
7. THE OBLIGATION OF ANY CONTRACT is not impaired by such statute because it suspends the proceedings of a bank by an injunction, and thereby diminishes the period for which the bank is by its charter empowered to act as a corporation; because if a bank violates its charter or the law, there must be some mode prescribed by judicial inquiry into the fact, and for giving redress to parties who have suffered thereby; and an injunction is not an arbitrary suspension of the corporate powers of the bank, but a species of compulsory process, analogous to the constant course of action in similar cases, designed to take the subject of controversy into the custody of the law, during the inquiry, to prevent further progress in a course thus shown to be mischievous and dangerous, and to secure the means of affording redress to the sufferers, in case the charges are found true. *Id.*
8. SUCH INJUNCTION IS NOT THE ADJUDICATION OF A FORFEITURE, nor is it an entire suspension of the corporate functions of the bank, but only an

inconsiderable interruption, and therefore is not in any just sense a diminution of the time for which the charter of the bank was granted. *Id.*

9. LEGISLATIVE ACT TRANSFERRING THE LEGAL TITLE OF A MERE NAKED TRUSTEE, and vesting it in the *cestui que trust*, in a case where the latter, by a resort to the proper tribunal, might have compelled such transfer, is constitutional and valid. *Ref. Prot. Dutch Church v. Mott*, 613.
10. THE LEGISLATURE MAY CREATE IN FAVOR OF PENDING ACTIONS additional remedies for the enforcement of rights which are therein attempted to be enforced; thus it may declare that no action then pending shall abate because the firms who are respectively parties defendant and plaintiff have a common member. *Hepburn v. Curtis*, 760.
11. ACT OF THE LEGISLATURE IS INVALID if it, in effect, divests an individual of his property without compensation. *Cochran et Ux. v. Van Surley*, 570.
12. LEGISLATURE, AS PARENS PATRIÆ, MAY PRESCRIBE SUCH RULES as it deems proper for the superintendence, management, and disposition of the property of infants, lunatics, and other incompetent persons. This power can not be so extended as to authorize a transfer, except where it can legally be presumed that the owner would have assented to the transfer if in a situation to act for himself. *Id.*
13. SPECIAL ACT OF THE LEGISLATURE AUTHORIZING THE SALE OF THE PROPERTY OF MINORS, to provide funds for their education and maintenance, is not unconstitutional. *Id.*
14. SPECIAL ACT OF THE LEGISLATURE may discharge existing trustees and vest their estate in new trustees to be appointed by the court of chancery; may convert an equitable life estate into a legal estate, and may authorize this tenant of the life estate to sell and convey the estate in fee, with the assent of the chancellor, where the estate in remainder is vested in the minor children of this tenant for life. *Id.*

See ADULTERY, 2; JURISDICTION, 6.

CONTRACTS.

1. PROMISE TO INDEMNIFY A SHERIFF FOR RELEASING A DEFENDANT from arrest is void as against public policy. The sheriff must obey his writ and can not take indemnity for refusing to obey it, although the person making the promise falsely informs him that the process had been satisfied. *Webber v. Blunt*, 445.
 2. RELEASE OF AN ATTACHMENT LIEN IS A GOOD CONSIDERATION for a promise made by a third person to pay the debt for which the attachment was levied. *Smith v. Weed*, 525.
 3. PARTY MUST ASSENT TO A PROPOSED CONTRACT at the time if he wishes to bind the other party. *Johnston v. Fessler*, 738.
 4. CONTRACT RESERVING A RATE OF INTEREST higher than that allowed by law is not void; the obligee may recover the principal sum with the legal rate of interest. *Bank of Chillicothe v. Swayne*, 707.
 5. CONTRACT TO ENDEAVOR TO PROCURE A PARDON from the governor for a compensation, is immoral and void. *Hatsfield v. Gulden*, 750.
- See ACTIONS, 1, 2, 5; ASSUMPSIT, 4; COMMON CARRIERS, 4, 7, 9, 15-17; CONFLICT OF LAWS, 1; CONSTITUTIONAL LAW, 7; INFANCY, 1; MISTAKE; PARTNERSHIP; RESCISSION OF CONTRACTS; TENDER; USAGE; VENDOR AND VENDEE.

CONTRIBUTION.

See CO-TENANCY, 1; SURETSHIP, 1-4, 6.

CONVEYANCES.

See CHARITABLE USES, 2; EXECUTORS AND ADMINISTRATORS, 21.

CORPORATIONS.

1. BY-LAW OF CORPORATION DECLARING THAT STOCK SHALL BE FORFEITED for default in the payment of calls, can not be legally enacted under a statute giving the corporation power "to make by-laws not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and for the transfer of stock." *Matter of Directors of Long Island R. R. Co.*, 429.
2. BY-LAW OF A CORPORATION IS VOID, if contrary to law, as where it imposes a forfeiture of goods, or is in restraint of trade, or is enforceable by extraordinary penalties. *Id.*
3. CORPORATIONS AGGREGATE, at the common law, had an unlimited power over their property, and they could alienate or grant any lesser estate therein without limitation or restriction. *Ref. Prot. Dutch Church v. Mott*, 613.
4. ACT OF 1806 (LAWS of 1806, c. 43, sec. 4) gives to religious corporations the power to convey real estate which is held in trust for the corporators; provided, the previous consent of the court of chancery to the alienation is given, as authorized by that act. *Id.*
5. WHETHER THE SUBSEQUENT RATIFICATION of a sale made by such corporation, without having previously obtained the consent of the court of chancery, would have the effect of vesting the title in the grantee discharged in equity of the charitable trust or use, *quære*. *Id.*
6. EFFECT OF THE ACT OF MARCH, 1801 (1 R. L. of 1801, 339), upon real estate held by individuals in trust for a Dutch church, incorporated prior to the passage of that act, was to transfer the legal title to such estate from the trustees directly to the corporation for the use of the corporators. *Id.*
7. NO SUBSEQUENT VIOLATION OF SUCH TRUST would ever re-vest either the legal or equitable title to the property conveyed in the original grantor, although a palpable breach thereof might form a proper ground for an application to the court of chancery on the part of the corporators, or by the attorney-general, to compel the due execution of the trust. *Id.*
8. FUNDS OF A FREE MASON LODGE ACCUMULATED UNDER A BY-LAW providing that they should be used "for the good of the craft, or for the relief of indigent and distressed worthy masons, their widows and orphans," can not, on the dissolution of the lodge, by a vote of the acting members, be divided among themselves for their private use. *Dute v. Fuller*, 392.
9. SUIT CAN NOT BE MAINTAINED AGAINST THE TREASURER of such lodge, by a member thereof, for his proportion of such funds. *Id.*
10. PROMISE TO TAKE AND PAY FOR STOCK in a joint stock association may be enforced by an action at law, although the plaintiff and defendants, being members of the same association, are therefore partners. *Townsend v. Govey*, 514.
11. AN UNINCORPORATED RELIGIOUS SOCIETY COULD NOT SUE at common law in its own name, nor in the name of its agents or trustees in whom no right of property is vested; but by the statute of 1814, of this state, the trustees in whom title is vested may sue. *Curd v. Wallace*, 85.

12. RELIGIOUS SOCIETIES MAY SUBMIT TO ARBITRATION their respective claims to the use of a meeting-house. *Id.*
 13. SECEDING OR EXPELLED MEMBERS OF A CHURCH have, at common law, no interest in its property. *Id.*
 14. EFFECT OF STATUTE OF 1814 on rights of seceding church members considered. *Id.*
 15. CONTRACT BY A CORPORATION WHICH IS FORBIDDEN BY ITS CHARTER is void. *Bank of Chillicothe v. Swayne*, 707.
 16. IF A CORPORATION CHARTER STATES that it "shall not take more than at the rate of six *per centum* per annum on its loans or discounts," it has no capacity to loan money at a higher rate, and if a loan at a higher rate be effected by discounting a bill of exchange, no recovery can be had thereon. *Id.*
- See CHARITABLE USES, 3; CONSTITUTIONAL LAW, 1, 7, 8; ELECTIONS; JUDGMENTS, 6; JURY, 3; STATUTE OF LIMITATIONS, 9.

COSTS.

WHERE A WILL HAS BEEN CORRECTLY CONSTRUED by the decree of the court below, the appellant who fails in reversing such decree, will be personally charged with the costs on appeal except in very special cases. *Mowatt v. Carow*, 641.

CO-TENANCY.

1. CO-TENANT IN POSSESSION acquiring an adverse title can not assert it against his co-tenants, if they are willing to contribute ratably to the cost of his purchase. *Sneed v. Atherton*, 70.
2. PURCHASE MADE BY ONE NOT THEN A CO-TENANT, does not inure to the benefit of those with whom he afterwards becomes a co-tenant. *Id.*
3. TENANT IN COMMON MAY MAINTAIN ACTION ON THE CASE against his co-tenant for flowing the land owned in common by means of a dam erected upon other land, for such act tortiously deprives the former of the use of the property, and is in the nature of a destruction of the use for which it was intended. *Odiorne v. Lyford*, 387.
4. MERE COVERTURE OF ONE OF THE PARTIES TO AN AGREEMENT for partition of real estate is not sufficient to invalidate it, where such agreement was made in the presence of her husband, assented to by him, consummated by an actual division, and possession taken and held according to it for fourteen years. *Hardy v. Summers*, 167.

COUNTER CLAIM.

See SET-OFF.

COURTS.

See JURISDICTION; PROCESS, 1, 2.

COVENANTS.

1. TERM "DEMISE" IN A LEASE IMPORTS COVENANT on the part of the lessor, of good right and title to make the lease, and for quiet enjoyment. *Ovrouk v. Fowle*, 350.
2. GENERAL IMPLIED COVENANTS ARE QUALIFIED and restrained by express covenants of a more limited character. *Id.*

3. IMPLIED COVENANTS RELATING TO TITLE MAY BE RESTRAINED by express covenants relating to possession. *Id.*
4. COVENANT IMPLIED FROM TERM "DEMISE" in a lease is restrained by a covenant that the lessor would not himself, nor should any person claiming under him, interrupt the possession of the lessee, during the term. *Id.*
5. HOWEVER ABSURD OR IMPROBABLE A COVENANT MAY BE, an action may be maintained for a breach thereof, unless it was not within the range of possibility. And a thing will not be deemed impossible if it could by any means be accomplished, although it was beyond the power of the obligor. *Beebe v. Johnson*, 518.
6. COVENANT TO PERFECT A PATENT RIGHT in England and to secure to the covenantee the entire control of the provinces of Upper and Lower Canada is not necessarily impossible, for this control might be secured by an act of parliament, and the covenantor is therefore answerable for a breach of the covenant. *Id.*
7. TENDER OF PERFORMANCE OF A MUTUAL COVENANT can not be made at the time of trial, for the first time, and yet support the action; it should be made before the action is instituted. *Withers v. Baird*, 754.
8. COVENANTS WITH RESPECT TO TITLE OF PROPERTY will apply to other property, which it is agreed may, in a certain event, be substituted for a part thereof. *Id.*
9. COVENANT TO FURNISH A WARRANTY DEED means a deed with special warranty, and not a deed with general warranty and with covenant against incumbrances. *Id.*

CRIMINAL LAW.

1. ASSAULT AND BATTERY IS NOT JUSTIFIED by a plea showing that the persons injured kept a disorderly house, and were injured in their attempts to prevent the defendants from destroying and abating it as a public nuisance. *Gray v. Ayres*, 107.
2. A WOUNDING BY ONE WHO HAS THE RIGHT to lay hands on and remove the injured party is not justified unless he has committed an assault or made such forcible resistance as to render the wounding necessary. *Brewster v. Paul*, 111.
3. FELONIOUS INTENT IS ESSENTIAL TO CONSTITUTE A TAKING of another's property a larceny. *Offutt v. Earlywine*, 40.
4. TO CONSTITUTE THE TAKING OF ANOTHER'S PROPERTY A LARCENY, it must be accompanied with circumstances showing a felonious intention. *Smith v. Shultz*, 33.
5. TO CONSTITUTE MURDER IN THE FIRST DEGREE, the killing must have been done with intent to kill, and that intent must have been formed prior to the time of the deed. *Bower v. State*, 325.
6. SPECIAL VERDICT FINDING A DEFENDANT GUILTY of the offense charged in the indictment, but not finding him guilty in the county, where the offense is alleged to have been committed, is insufficient. *Commonwealth v. Call*, 284.
7. SUCH A VERDICT DOES NOT AMOUNT TO AN ACQUITTAL, but the accused is entitled to a new trial. *Id.*
8. CRIMINAL PROCESS CAN NOT BE USED TO COMPEL ONE to discharge a civil liability; and a promissory note procured by the illegal use of such process, is void. *Shaw v. Spooner*, 348.

9. **MALICIOUS MISCHIEF MUST PROCEED FROM MALICE** toward the owner of property injured, and evidence that property was injured or destroyed through mere wantonness, or in sport, and not from a feeling of resentment towards its owner or possessor, is not sufficient to convict the defendant upon an indictment charging this offense. *State v. Robinson*, 661.
See **ADULTERY**; **JUDGMENTS**, 25; **WITNESSES**, 4-6.

DAMAGES.

- DAMAGES ARE RECOVERABLE FOR TIME AND MONEY SPENT** in searching for property wrongfully taken. *Bennett v. Lockwood*, 532.
See **ACTIONS**, 5; **AGENCY**, 2, 3, 4; **BOUNDARIES**, 6; **EMINENT DOMAIN**, 2, 4, 6; **SLANDER**, 3, 4; **TRESPASS**, 5; **TROVER**.

DAYS OF GRACE.

- See **HOLIDAYS**, 2.

DECLARATIONS.

- See **AGENCY**, 5; **ATTACHMENT**, 5; **INFANCY**, 1; **PLEADING AND PRACTICE**, 2.

DEDICATION.

- See **STATUTES**, 7; **LIMITATIONS**, 9.

DEEDS.

1. **LAND WILL NOT PASS AS INCIDENT** or appurtenant to land. *Van O'Linda v. Lothrop*, 261.
2. **WHERE THE OWNER OF A NARROW STRIP OF LAND**, and also of the land adjoining it on the north and on the south, conveyed to the same grantee the land on the north and on the south, describing the one as land bounded by an "intended street," and the other as land bounded by a "street;" these words being used to designate the narrow strip, the fee in the latter does not pass by such conveyance, but the grantee has a right of way therein by implication or on the principle of estoppel. *Id.*
3. **GRANT OF PROPERTY INCLUDES** all that is necessary to its enjoyment. An exception out of a grant includes all that is necessary to the enjoyment of the thing excepted. *Allen v. Scott*, 238.
4. **GRANT OF LAND AND ALL THE BUILDINGS** thereon, "except the brick factory," does not pass the land on which the factory stands, nor the water privilege appurtenant thereto. *Id.*
5. **THERE CAN BE NO DELIVERY AS AN ESCROW OF A DEED TO THE OBLIGEE** therein, but in all such cases the condition upon which the deed was to take effect is a nullity, and the delivery is absolute. *Foley v. Cowgill*, 49.
6. **DEED FILED FOR REGISTRATION TAKES PRECEDENCE OVER LEVY** made under execution issued on the same day when the facts show the execution to have been issued after the deed was filed. *Metta v. Bright*, 683.
7. **LAW REGARDS FRACTIONS OF A DAY**, when time is material, and will take notice of the hour of the day at which an act was accomplished. *Id.*
8. **OMISSION OF REGISTER TO NOTE THE TIME OF DELIVERY OF DEED FOR REGISTRATION** does not invalidate the registration, although the law requires the register to make an indorsement thereof on the deed. *Id.*

9. **REGISTRATION OF A DEED IS DEEMED TO BE COMPLETE** from the time it was commenced, and is effective, operative, and conclusive from that moment. *Id.*
10. **DEED UPON AN UNLAWFUL CONSIDERATION WILL NOT BE VACATED**; the parties stand *in pari delicto*, and will be left where the court finds them. *Moore v. Adams*, 723.
- See **ACKNOWLEDGMENTS**; **BOUNDARIES**, 1, 3-5; **COVENANTS**, 9; **DURESS**, 1; **MISTAKE**, 4; **SEALS**; **VENDOR AND VENDEE**, 3.

DELIVERY.

See **BONDS**, 1; **DEEDS**, 5; **GIFTS**.

DEMAND.

See **ASSIGNMENTS FOR BENEFIT OF CREDITORS**; **NEGOTIABLE INSTRUMENTS**.

DEPOSITIONS.

See **EVIDENCE**, 10.

DEVISES.

See **CONFLICT OF LAWS**, 2, 3; **WILLS**.

DISCOVERY.

See **EQUITY**, 7.

DIVORCE.

See **MARRIAGE AND DIVORCE**.

DOGS, INJURY BY.

See **FEROCIOUS ANIMALS**; **TRESPASS**.

DOMICILE.

1. **RESIDENT—ONE COMING TO THIS STATE FOR A SPECIAL and temporary purpose**, without any intention of settling, is not a resident here within the meaning of the act for the relief of insolvent debtors. *Frost v. Brislin*, 423.
2. **TO CONSTITUTE A RESIDENCE** there must be a settled, fixed abode, an intention to remain permanently, at least for a time, for business or other purposes. *Id.*
3. **DOMICILE MAY BE IN ONE STATE**, and residence in another. *Id.*
4. **NON-RESIDENT—ONE WHO LEAVES THIS STATE and goes to another and establishes a business there**, intending to reside there if the business does not prove unsuccessful, and who there gives the business his personal supervision and control, becomes a non-resident of this state, although his wife and child remain here; and such person may be arrested here as a non-resident, although he had, when arrested, been in this state, on a visit, for more than one month. *Id.*
5. **WHERE ONE LEAVES THE JURISDICTION TO PERFORM AN ACT FORBIDDEN** by the general policy and by the laws of the state, and immediately after the performance returns, his act will be treated as nugatory by the tri-

banals of his state whether or not it was legal where performed. *Hinds v. Brazeale*, 307.

See ESTATES OF DECEASED PERSONS, 1, 2; **MARRIAGE AND DIVORCE**, 6-8; **MARRIED WOMEN**, 3.

DOWER.

1. **TO ENTITLE A WIDOW TO DOWER**, the husband must in his life-time have been seised of a present estate in possession in the premises, and the right to dower can not extend to any part of the premises over which such present estate or interest did not vest in possession during the coverture. *Safford v. Safford*, 633.
2. **WHERE A DECEDENT TAKES HIS ESTATE BY DESCENT** from an ancestor whose widow is entitled to dower in such estate, and which she afterwards claims and has set off to her, the decedent's present estate in that part of the property is considered as suspended, by relation, from the time of the descent cast upon him, so that if he dies in the life-time of such dowress, his own widow can never be entitled to dower in that third of the estate, even after the death of the first dowress. *Id.*
3. **WHERE A FATHER DIED SEISED OF LANDS** which descended to his son subject to the mother's life-estate in one third thereof as her dower, and the son afterwards died in the life-time of his mother, leaving a widow, the latter is not entitled to dower in that third of the premises, either during the life of the mother or after her death. *Id.*
4. **DOWER IS A LEGAL RIGHT**, and it can not be regarded as fraudulent to claim it at law, unless there has been some forfeiture, release, bar, or satisfaction, which can not be proved at law, but which may be established in equity. *O'Brien v. Elliot*, 137.
5. **AN EQUIVALENT, TO BE A SATISFACTION** of dower, in equity, must be designed and accepted in lieu thereof. *Id.*
6. **DOWER IS NOT BARRED IN EQUITY** by a creditor levying upon the land of his debtor, and, after the right to redeem has expired, selling it with warranty, and paying the excess of the money received over his debt to the widow and children of the debtor. *Id.*

See PARTNERSHIP, 6; **SPECIFIC PERFORMANCE**, 3.

DURESS.

1. **MENACES FOR WHICH ONE MAY AVOID HIS ACT OR DEED** exist when he is put in fear of imprisonment, or mayhem, or loss of a member, or of his life. *Moore v. Adams and Newkirk*, 723.
2. **DURESS OF IMPRISONMENT DOES NOT EXIST** when the imprisonment or duress is tortious and unlawful. *Id.*

EASEMENTS AND SERVITUDES.

1. **SERVITUDE AGAINST A LOWER ESTATE** requires it to receive all waters which naturally flow from a higher one. *Martin v. Jett*, 120.
2. **SERVITUDE MUST NOT BE INCREASED OR CREATED** by the industry of man. *Id.*
3. **THE PROPRIETOR BELOW IS NOT ALLOWED TO ERECT ANYTHING TO OBSTRUCT** the natural flow of the waters; the proprietor above must do nothing to make the natural servitude more onerous. *Id.*
4. **OWNER OF DOMINANT TENEMENT HAS NO RIGHT BY MEANS OF DITCHES** to collect in one channel waters which would otherwise remain stagnant or

evaporate, or gradually flow off, and discharge them in a mass upon his neighbor. *Id.*

5. **RIGHT TO ENTER ON LAND TO CLEAR DITCH OR CANAL.**—Where one is the owner of an ancient mill to which there has been attached a race-way, being an artificial canal for conducting off the water from the mill, and without the free and unobstructed current of which the mill could not be worked, and such canal has from time immemorial passed through the land of another, and there is no grant or contract regulating the rights of the parties, the owner of the mill has a right to enter upon the land through which the race-way passes and to clear out the obstruction therefrom in the usual and ordinary mode in which such canals are cleansed, doing no unnecessary damage. *Prescott v. White*, 286.
6. **WHERE SUCH A CANAL HAS PASSED** through the land of another from time immemorial, it is evidence of an antecedent grant from the owner of the land to the owner of the mill, to construct and keep such a canal, and to make the beneficial use of it for which it was obviously intended. *Id.*
7. **LAW PRESUMES IN THE ABSENCE OF A GRANT** or contract, that the party who enjoys the benefit of an easement is to keep it in repair, and where such easement is a canal passing through the lands of another, the person who has the benefit thereof has the authority and license to enter upon such land and clear the canal in a reasonable and proper manner. *Id.*
8. **WHETHER IT IS THE RIGHT OR DUTY** of a millowner, in cleansing a race-way which passes through the lands of another, to place the materials taken out on the adjoining bank or to carry them off, depends on the nature of the materials and other circumstances in the particular case. *Id.*
9. **ANCIENT LIGHTS WHICH HAVE EXISTED UNDISTURBED** for over twenty years constitute an easement, and the owner of an adjoining lot has no right to obstruct them, particularly if he was also the owner of the building containing the ancient lights at the time of its construction, and subsequently sold it to another. *Robeson v. Pittenger*, 412.
10. **WAY, REASONABLE USE OF, WHAT IS.**—Persons who, in a populous town, erect buildings and fences on the line of a street, with doors and gates so constructed as when open to swing over it; or who, in constructing such buildings, place within the limits of the street building materials, and the earth dug from the cellar, if removed within a reasonable time, or spread earth on the street to improve it as a way, or allow horses and carriages to stand on such street, are not liable in trespass for such acts to the owner of the soil of the street. *Van O'Linda v. Lethrop*, 261.

See **BOUNDARIES**, 7.

EJECTMENT.

AFTER THE DEMISE IN EJECTMENT HAS EXPIRED, the judgment is inoperative; possession taken under it is a trespass; the tenant in possession is in no danger from it, and is therefore not justifiable in purchasing or taking shelter under the title on which it was based. *Chambers v. Pleak*, 78.

See **HUSBAND AND WIFE**, 3.

ELECTIONS.

1. **POWER TO REGULATE ELECTIONS** means the power to establish fixed rules and methods of proceeding for the government of elections; fixing time

and place of election is within this power. *Matter of Directors of Long Island R. R. Co.*, 429.

2. NOTICE OF AN ELECTION OF DIRECTORS must be for the time and in the manner provided by statute, when the by-laws, though fixing the time and place for the election, fail to state what length of time or in what mode the notice shall be given. *Id.*
3. TRANSFER BOOK OF THE CORPORATION IS CONCLUSIVE upon the question of who are entitled to vote at the election. *Id.*
4. ELECTION OF DIRECTORS MUST BE SET ASIDE when votes sufficient to change the result have been erroneously rejected. The court can not declare elected those who would have been elected had the votes rejected been counted for them. *Id.*

EMBLEMENTS.

See EXECUTORS AND ADMINISTRATORS, 6; VENDOR AND VENDEE, 2.

EMINENT DOMAIN.

1. PLAINTIFF MAY DISCONTINUE PROCEEDINGS TO ACQUIRE PROPERTY for widening a street, at any time prior to the final confirmation of the commissioner's report. *Matter of Anthony Street*, 608.
2. VESTED RIGHT TO DAMAGES ASSESSED for property sought to be taken in the exercise of the power of eminent domain, does not exist until the final confirmation of the commissioner's report. *Id.*
3. NO PART OF THE COMMISSIONER'S REPORT CAN BE REGARDED AS FINALLY CONFIRMED while any part remains under consideration and unapproved. *Id.*
4. FOR WORK DONE BY A TOWN UNDER AUTHORITY OF A STATUTE, and in the performance of a public trust, no action for damages can be maintained. *Hickox v. City of Cleveland*, 730.
5. ASSESSMENT OF COMPENSATION MAY BE MADE BY COMMISSIONERS, for property taken for public use. A trial by jury need not be required. *Id.*
6. WHERE PROCEEDINGS FOR THE ASSESSMENT OF DAMAGES for property injured by grading a street are authorized, the party injured must resort to such proceedings, and can not sustain an action at law. *Id.*

EQUITABLE INTEREST.

See EXECUTIONS, 2.

EQUITY.

1. COURT OF CHANCERY IN ENGLAND DECREES SUITABLE MAINTENANCE to a wife out of her equitable interests in case of desertion or ill-treatment by the husband. This jurisdiction is not, however, maintained upon the ground merely of a trust which the court has a right to enforce, but is a separate branch of equity, and seems originally to have been exercised only where the husband sought the aid of a court of chancery to gain possession of his wife's property. *Parsons v. Parsons*, 362.
2. STATUTE CONFERRING CHANCERY POWERS IN CASES OF TRUST, upon this court, does not empower it, upon the application of a wife, to decree to her a maintenance out of her equitable property where she has been deserted by her husband. But if the husband or his assignee seeks the aid of the court to obtain possession of the wife's property, it may, perhaps,

- require him to make provision for her support before it will aid him in recovering it. *Id.*
3. **LANDS IN ANOTHER STATE.**—**COURT OF CHANCERY HAS NO JURISDICTION** to make a decree which will directly affect either the legal or equitable title to lands situated in another state. *Hawley v. James*, 623.
 4. **WHERE THE CHANCELLOR HAS JURISDICTION**, an error committed by him in its exercise can not render his action void. *Cochran v. Van Surlay*, 570.
 5. **COURT OF EQUITY WILL NOT INTERFERE** to relieve a mortgagor, who by his negligence fails to perform his contract, whereby the whole debt becomes due and payable according to the terms of the mortgage, unless he tenders or pays the whole debt. *Noyes v. Clark*, 620.
 6. **A MORTGAGEE OR HIS ASSIGNEE** will not be permitted to take an unconscientious advantage of the mortgagor, who is willing to pay at the time prescribed, but is prevented from doing so by their acts. *Id.*
 7. **PARTY HAVING EQUITABLE CLAIMS HAS A RIGHT** to a discovery under oath from the defendant, to have all the proofs on which his claims depend taken in due form and submitted to the decision of a court of equity, and, if dissatisfied with its decision, to have it reviewed in the highest appellate tribunal in the State. *Hardy v. Summers*, 167.
 8. **COUNTY COURT CAN NOT DEPRIVE PARTY OF SUCH RIGHT**, by the summary exercise of the powers specially delegated to it under the act of descents. *Id.*
 9. **COURTS OF CHANCERY DO NOT INTERFERE WITH JUDGMENTS** at law, except to prevent fraud, or to relieve from gross injustice; and they never grant an injunction merely for the correction of irregularities in legal proceedings. *Fowler v. Lee*, 172.
 10. **COURT OF EQUITY WILL NOT REFUSE RELIEF TO A PARTY** against a judgment, on the ground of his not having made his defense at law, where the agreement upon which his defense depended was void at law, being within the statute of frauds; or where the defense rested upon matters done in the execution of an express trust. *Jones v. Hardesty*, 180.
 11. **COURTS OF EQUITY NEVER SET ASIDE PROCEEDINGS AT LAW**, except at the instance of those whose interests are affected by them. *Harris v. Alcock*, 158.
 12. **EQUITY ALWAYS RATIFIES THAT, WHEN DONE**, which, if previously applied to, it would have ordered to be done. *Id.*
 13. **ANSWER TO A BILL IN EQUITY** that is unsupported by proof, and not responsive to the bill, but setting up matters in avoidance, must be considered as untrue and out of the case. *O'Brien v. Elliot*, 137.
 14. **EQUITY WILL ENTERTAIN JURISDICTION FOR THE PREVENTION OF A MULTIPLICITY OF SUITS**, in an action in which a general legal right, in respect to property, is sought to be enforced against several persons claiming portions of the same property, by titles that are individual, separate, and distinct. *Vann v. Hargett*, 689.
 15. **PLAINTIFF'S RIGHT TO RECOVER BY AN ACTION AT LAW**, will not preclude him from obtaining relief in equity where there are numerous adverse claimants, whose rights are several and distinct. *Id.*
 16. **EQUITY JURISDICTION, IN AN ACTION** by a plaintiff claiming a general legal right, is not confined to those cases in which a judgment at law against one of numerous adverse claimants, would not effectually protect the plaintiff's rights from future disturbances from the same cause or by the same person. *Id.*

17. **BILL IN EQUITY IS NOT DEMURRABLE FOR MULTIFARITOUSNESS** where the plaintiffs claim by a single, general, and entire right, although in opposition to the distinct and separate rights of several defendants. *Id.*
 18. **PLAINTIFF SHOULD ORDINARILY ESTABLISH HIS RIGHT AT LAW** before seeking relief in equity upon the ground of the prevention of a multiplicity of suits, but where the parties are numerous and can not be ascertained, this rule is relaxed. *Id.*
 19. **BILL IN EQUITY MAY BE SUSTAINED BY SEVERAL PLAINTIFFS** on behalf of others jointly interested with them, when it is alleged in the bill, that the persons not made parties to the action, are unknown or not within the jurisdiction of the court. *Id.*
 20. **DECREE IN EQUITY UPON A BILL BROUGHT BY SEVERAL PLAINTIFFS** on behalf of a greater number having a joint and equal interest in the subject of the action, will bind the persons who are not parties to the bill, so far as to determine the validity of their claim as a just demand, but such parties will not be bound by an account taken in the action, until they have been allowed an opportunity to be heard. *Id.*
 21. **EQUITY WILL NOT ATTEMPT TO COMPEL A HUSBAND** to the specific performance of his contract made with reference to his wife's property. *Clark v. Seirer*, 745.
- See ATTORNEY AND CLIENT**, 1, 3; **CHARITABLE USES**, 1, 4; **CONSTITUTIONAL LAW**, 14; **CORPORATIONS**, 4, 5, 7; **DOWER**, 4-6; **EXECUTIONS**, 2; **EXECUTORS AND ADMINISTRATORS**, 2-4, 7, 8; **IMPROVEMENTS**; **INJUNCTION**; **SET-OFF**, 1; **SPECIFIC PERFORMANCE**.

ERROR.

See PLEADING AND PRACTICE, 6.

ESCROW.

See DEEDS, 5.

ESTATES OF DECEASED PERSONS.

1. **A BOND IS ASSETS AT THE DECEASED OBLIGEE'S DOMICILE** or at the place where it happened to be when he died. *Fletcher v. Sanders*, 96.
 2. **A DEBT DUE BY PAROL IS ASSETS WHERE THE DEBTOR RESIDES**, unless it lawfully comes to the hands of the administrator of the creditor's domicile. *Id.*
 3. **FILING THE PETITION AND APPOINTMENT OF COMMISSIONERS** under the act of descents, is an *ex parte* proceeding, and the proceeding of the county court, in confirming or rejecting their return, is summary; and neither law nor custom requires the proofs exhibited by the parties to be reduced to writing, or in any way introduced into the record of the proceedings, so that an appeal to the court of last resort, even if permitted, would not avail the appellant. *Hardy v. Summers*, 167.
 4. **COUNTY COURT HAS NO POWER TO DIVIDE REAL ESTATE** of a decedent, except in cases where the parties entitled can not agree upon a division thereof. *Id.*
- See DOWER**, 2; **EXECUTORS AND ADMINISTRATORS**, 2, 4, 5, 9-13, 17-20; **JURISDICTION**, 2, 4; **PROBATE COURT**; **TRUSTS AND TRUSTEES**, 1, 2.

ESTOPPEL.

1. A PRIOR MORTGAGE OR CLAIMANT OF PROPERTY who encourages or in any way acts in the negotiation or consummation of a subsequent transfer of that property which is inconsistent with such prior right, and at the same time conceals from the purchaser the knowledge of the existence of his claim, will not be permitted afterwards to set up such prior right against the purchaser or his grantees. *L'Amoureux v. Vandenberg*, 635.
2. ESTOPPEL.—ONE STANDING BY AND SEEING ANOTHER making large expenditures on property, to which he has some claim of which he gives no notice, can not afterwards assert his claim. But this principle does not apply where the expenditures are made upon the public domain or upon the lands of the person making them; for then third persons have no right to object. *Gray v. Bartlett*, 208.
3. OWNER BY EXHIBITING A THIRD PERSON TO THE WORLD AS HAVING POWER TO SELL GOODS, loses the right to recover the goods from bona fide purchasers to whom they are sold by such person. *Per Verplanck, senator. Saltus v. Everett*, 541.

See DEEDS, 2; SURETYSHIP, 9.

EVIDENCE.

1. EVIDENCE OF WHAT WAS THE REAL CONSIDERATION OF A NOTE upon which a judgment has been confessed, may be admitted, where the validity of such judgment is assailed by creditors of the judgment debtor, on the ground of want of consideration for the note. *Harris v. Alcock*, 158.
2. PAROL EVIDENCE IS INADMISSIBLE TO VARY THE TERMS of a written agreement. *Foley v. Cogill*, 49.
3. PRINTED VOLUME OF THE LAWS of a foreign country, proved by witnesses to have received the sanction of the executive and judicial officers of such country, as containing its laws, is admissible in evidence in a case where the title to property situated within that county is in question. *Owen v. Boyle*, 143.
4. UNWRITTEN FOREIGN LAW is to be proved as a fact. *Id.*
5. CERTIFICATE THAT A CERTAIN FACT APPEARS OF RECORD, without producing an authenticated copy of the record, is no evidence of the existence of the fact. *Id.*
6. COURTS OF THIS COUNTRY TAKE NOTICE of the common law of England without proof; not, however, because it is the common law of a foreign country, but because it has become a law to us, and we look to it, without proof, as to our own law. *Id.*
7. COURTS OF MAINE will not presume without evidence that all property placed upon the land of another in a foreign country, is liable to distress for rent in arrear, because there are many exceptions to such rule in favor of trade and commerce. *Id.*
8. COURTS WILL NOT PRESUME WITHOUT EVIDENCE that the common law of England is also the common law of her colonies. *Id.*
9. ACCOUNT BOOKS OF A MANUFACTURER are admissible in his favor, though the entries were first made on a slate by the foreman, and were, at night, transcribed by the manufacturer. *Sickles v. Mather*, 521.
10. DEPOSITION IN CHANCERY READ WITHOUT OBJECTION is evidence for a co-defendant. *Fletcher v. Sanders*, 96.

11. ANSWER OF ONE DEFENDANT IS NOT EVIDENCE against his co-defendant, in chancery. *Jones v. Hardesty*, 180.
 12. PAROL EVIDENCE IS NOT ADMISSIBLE to prove the contents of a written contract; but where the written contract is merely an act of one of the parties to a prior oral agreement, performed in execution thereof, the existence of such written contract will not exclude evidence of the oral agreement. *Id.*
 13. TIME OF DELIVERY OF DEED FOR REGISTRATION MAY BE PROVED BY PAROL when the register has neglected to note the exact time at which such delivery was made. *Metts v. Bright*, 683.
 14. CERTIFICATE OF RECORDER OF DEEDS to a copy of the commission of a justice of the peace on record in his office, is competent proof of the official character of such justice, where that fact comes collaterally in question. *Bennet v. Paine*, 765.
- See ACKNOWLEDGMENTS, 1; BOUNDARIES, 2; CRIMINAL LAW, 9; GIFTS; INFANCY, 1; INSANITY; INSURANCE—MARINE, 1, 8, 11, 12; JURY, 2; MARRIAGE AND DIVORCE, 1, 2, 4; MARRIED WOMEN, 2; NEGOTIABLE INSTRUMENT, 1, 11, 13, 21; PLEADING AND PRACTICE, 1-3; PROCESS, 4; SLANDER, 2, 3, 5; TRESPASS; WITNESSES.

EXECUTIONS.

1. EXECUTION ISSUED FOR MORE THAN IS DUE on the judgment, is not, *per se*, fraudulent and void; it is only when issued with fraudulent intent that it is void, and if issued *bona fide*, it will avail the plaintiff to the extent of the debt remaining due. *Harris v. Alcock*, 158.
 2. DEBTOR'S EQUITABLE INTEREST IN PERSONAL PROPERTY can not at law be seized and sold under a *feri facias*; but, after the return of the writ unsatisfied, the judgment creditor may, in equity, obtain leave to redeem the prior incumbrance, and then have the property sold to pay the incumbrance, and also the execution debt. *Id.*
 3. OFFICER NEGLECTING TO PROPERLY LEVY UPON, advertise, or sell property upon execution, whereby the purchaser loses title, is liable to such purchaser in an action on the case. *Sexton v. Nevers*, 225.
 4. OFFICER IS RESPONSIBLE FOR NEGLECT OF DEPUTY in not giving legal notice of sale. *Id.*
 5. MEASURE OF DAMAGES IN AN ACTION AGAINST AN OFFICER for failing to give proper notice of a sale, if it be shown that the plaintiff has not lost any title by the error, is no more than the fees which the officer has collected for the levy and sale. *Id.*
 6. PURCHASER OF LANDS UNDER EXECUTION ISSUED UPON A SATISFIED JUDGMENT will hold the same if nothing of record showed the satisfaction; though he was warned at the time of the sale by the execution defendant that the sale was illegal and void. *Doe v. Snyder*, 311.
 7. QUASHING AN EXECUTION WILL NOT DEFEAT A SALE previously made under it. *Id.*
 8. REDEMPTION OF LANDS CAN NOT BE ACCOMPLISHED otherwise than by strict compliance with the statute. *Waller v. Harris*, 590.
 9. SALE UNDER SENIOR JUDGMENT, after the time of redemption expires, cuts off all junior judgments so that no further redemption can be made thereunder or by virtue thereof. *Id.*
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10. ACCEPTANCE OF REDEMPTION MONEY INDUCED BY FALSE REPRESENTATIONS of the sheriff that the law governing redemptions had been complied with, is not a waiver of the right to object to a non-compliance with the law, and, on refunding or offering to refund the money, to hold the property free from such redemption. *Id.*
 11. FIERI FACIAS TAKES EFFECT FROM THE FIRST DAY OF THE TERM at which it was issued, and, in the absence of statutory regulations, will enable the sheriff to seize the goods of a defendant even in the hands of a bona fide holder, who has purchased since the writ took effect. *Farley v. Lea*, 690.
 12. FIERI FACIAS IS ENTITLED TO PRIORITY OVER A CONVEYANCE made on the second day of the term at which the writ was issued, notwithstanding judgment in the action was not, in fact, confessed, until after such conveyance had been made and registered. *Id.*
 13. JUSTICE'S EXECUTION IS RENDERED EFFECTUAL BY LEVY, and binds personal property only from and after the time when the levy is completed. *Mette v. Bright*, 683.
 14. PURCHASER AT A SALE UNDER EXECUTION ISSUED ON A SATISFIED JUDGMENT, where nothing of record shows the satisfaction, will take a good or bad title accordingly as he had or had not actual notice of the satisfaction. *Hoffman v. Strokecker*, 740.
 15. PURCHASER FOR A VALUABLE CONSIDERATION WITHOUT NOTICE, actual or legal, that the execution upon which his vendor's title depended was issued on a satisfied judgment, will not be affected by that fact. *Id.*
- See CONFLICT OF LAWS, 4; DEEDS, 6; JUDGMENTS, 8-11, 13, 24; PROCESS, 2-6; SURETYSHIP, 13.

EXECUTORS AND ADMINISTRATORS.

1. A FOREIGN EXECUTOR OR ADMINISTRATOR CAN NOT MAINTAIN A SUIT in New York by virtue of letters testamentary, or of administration granted abroad. *McNamara v. Dwyer*, 627.
2. COURT OF CHANCERY MAY COMPEL A FOREIGN EXECUTOR OR ADMINISTRATOR to account for the trust funds which he received abroad and brought with him into this state, upon a bill filed for that purpose by the next of kin of the decedent, without letters of administration on the estate of the decedent being issued here. *Id.*
3. UPON A BILL FILED FOR THAT PURPOSE, if the foreign administrator or executor is about to leave the state, he may be arrested upon a *re exeat* and held to equitable bail, as in other cases. *Id.*
4. WHERE A BILL IS FILED AGAINST A FOREIGN EXECUTOR OR ADMINISTRATOR for assets received by him in the place where he was appointed, and brought into this state, the nature and extent of his liability depends upon the laws of the state or country from which he derived his authority to administer the assets of the decedent. *Id.*
5. SUCH ASSETS MUST BE DISTRIBUTED among the next of kin, or applied to the payment of debts, in the same manner as though the remedy was sought by the creditors or distributees at the place of the appointment of such executor or administrator. *Id.*
6. EMBLEMENTS UPON LAND NOT DEVISED are personal assets, and as such belong to the executor. *Bradshaw v. Ellis*, 686.

7. ADMINISTRATOR IS A TRUSTEE FOR THE HEIRS, and this court, sitting as a court of chancery, has jurisdiction, in a proper case, to enforce their rights against him. *Parsons v. Parsons*, 362.
 8. SUIT IN EQUITY MAY BE REVIVED BY ADMINISTRATOR DE BONIS NON, after the death of the administrator by whom it was begun. *Fletcher v. Sanders*, 96.
 9. JURISDICTION TO GRANT LETTERS OF ADMINISTRATION ON ESTATE OF NON-RESIDENT does not exist in the courts of this state, unless he had assets here at the time of his decease. *Id.*
 10. ONLY THE COURTS OF THE COUNTY IN WHICH A NON-RESIDENT LEFT ASSETS can grant a probate of his will or letters of administration on his estate. *Id.*
 11. ADMINISTRATOR OF THE DOMICILE should, if he can, get possession of the personal assets situate elsewhere. On obtaining such possession, they will be treated as assets of the domicile, and he will be held accountable for them. *Id.*
 12. AN EXECUTOR IS LIABLE FOR ALL ASSETS OF THE DECEDENT received by him, whether with or without authority. *Id.*
 13. LETTERS OF ADMINISTRATION GRANTED IN ANOTHER STATE OR NATION have, *per se*, no force here. *Id.*
 14. ASSETS MUST BE ADMINISTERED UNDER AUTHORITY of the local law. *Id.*
 15. ADMINISTRATORS MUST ACCOUNT TO THE AUTHORITY whence their powers were granted, and can not sue or be sued, in their official character, in a foreign state. *Id.*
 16. ADMINISTRATOR OF THE DOMICILE is often preferred in granting administration in a foreign country. *Id.*
 17. ADMINISTRATION IN A FOREIGN COUNTRY IS ANCILLARY to that of the domicile; to the latter any residuum of assets in the former should be transmitted. *Id.*
 18. ANCILLARY ADMINISTRATOR HAS NO CONTROL over assets situate beyond the jurisdiction whence he derives authority. *Id.*
 19. SURETY OF ANCILLARY ADMINISTRATOR IS NOT RESPONSIBLE for assets received from a foreign country. *Id.*
 20. SURETY OF ADMINISTRATOR OF THE DOMICILE IS RESPONSIBLE for assets which lawfully come to his hands from any part of the world. *Id.*
 21. CONVEYANCE BY AN EXECUTOR, FAILING TO SET FORTH AT LARGE the order under which it was made, when the statute requires it to be so set forth, is invalid. *Atkins v. Kinnan*, 534.
- See ATTORNEY AND CLIENT, 2; ESTATES OF DECEASED PERSONS, 2; PARTNERSHIP, 1; PROBATE COURT, 1, 4; SURETYSHIP, 8, 10.

EXEMPTIONS.

See ATTACHMENT, 5.

EXPRESS COVENANTS.

See COVENANTS, 2, 3.

FALSE REPRESENTATIONS.

See EXECUTIONS, 10; FRAUDS, 2, 3.

FALSE RETURN.

See JUDGMENTS, 11.

FEROCIOUS ANIMALS.

OWNER OF A SAVAGE AND FEROCIOUS DOG, or other animal, who, with knowledge of its disposition, keeps the same negligently, is liable for the injury it is thereby enabled to do. *Pickering v. Orange*, 35.

See TRESPASS.

FINDINGS.

See JURY, 1.

FIXTURES.

See LANDLORD AND TENANT, 4-7.

FLATS.

See WATERCOURSES, 6.

FOREIGN ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS, 1-5.

FOREIGN LAW.

See EVIDENCE, 3, 4, 6-8.

FORTHCOMING BOND.

See JUDGMENTS, 13.

"FOR WHOM IT MAY CONCERN."

See INSURANCE—MARINE, 15, 16.

FRAUD.

1. NO INFERENCE OF FRAUD CAN BE DRAWN from the fact that one judgment is taken for three separate claims, where the object was to place each of the three creditors on an equal footing. *Harris v. Alcock*, 158.
2. MISREPRESENTATIONS ARE NOT FRAUDULENT unless they have been made with intent to deceive. *Miller v. Howell*, 36.
3. MISREPRESENTATIONS AS TO THE VALUE OR QUANTITY OF A COMMODITY in market, where correct information on those subjects is equally within the power of both parties to a contract which is induced thereby, does not, in contemplation of law, constitute fraud. *Foley v. Conagill*, 49.
4. FRAUDULENT CONVEYANCE IS GOOD except as against the grantor's creditors. *McGee v. Campbell*, 783.
5. CREDITORS OF A FRAUDULENT GRANTOR can not seize the property conveyed otherwise than by virtue of process the authority of which extends to the place in which the property is found. *Id.*
6. WHERE A CONVEYANCE PURPORTING TO BE ABSOLUTE is in fact accompanied by a secret trust, that the creditor to whom it is made shall hold the property merely as security, and shall hold any balance realized after the discharge of his debt, subject to the order of his debtor, the transaction will be held fraudulent, and the conveyance void as to other creditors. *McCulloch v. Hutchinson*, 776.

See ASSUMPSIT, 1; ATTORNEY AND CLIENT, 3; COMMON CARRIERS, 8; EXECUTIONS, 10; MORTGAGES; SHIPPING, 14.

FRAUDULENT CONVEYANCE.

See FRAUD, 4-6.

FRAUDULENT SALES.

See SALES, 2-4, 6.

GARNISHMENT.

See ATTACHMENT, 2.

GENERAL AVERAGE.

See INSURANCE—MARINE, 6.

GIFTS.

WHERE A FATHER GAVE HIS DAUGHTER, then of age and living in his family, a female calf, if she would bring it up, which she did, and it was fed on her father's farm, and after it became a cow the milk was used in his family, and no charge was made for the daughter's board, or for the keeping of the cow, nor by the daughter for her work or the milk of her cow, it was held that there was sufficient proof of a gift and delivery to the daughter as against a creditor of the father. *Martrick v. Linfield*, 265.

GRANTS.

See DEEDS; VENDOR AND VENDEE, 2.

GROWING CROPS.

See VENDOR AND VENDEE, 2.

GUARDIAN AND WARD.

1. **LOAN BY GUARDIAN** on borrower's note, secured by pledge of stock in a manufacturing company at three fourths of its par and less than three fourths of its market value, is an investment justified by sound discretion, and the guardian will not be held responsible for a loss resulting from a subsequent depreciation in the value of the stock. *Lovell v. Minot*, 206.
2. **SALE BY GUARDIAN ON CREDIT**, of shares in a corporation, for which he takes purchaser's note secured by two indorsers, and also the note of another person secured by a mortgage on real estate, will be deemed to be in good faith and in the exercise of a sound discretion, and he will not be required to make good any resulting loss. *Id.*

HIGHWAYS.

CASE IS THE PROPER REMEDY for injuries occasioned by the obstruction of a highway. *Martin v. Bliss*, 52.

See EASEMENTS AND SERVITUDES, 10.

HOLIDAYS.

1. **SUNDAY.**—IN COMPUTING THE TIME ALLOWED TO DO AN ACT, intervening Sundays are included; but if the day of performance falls on Sunday, it is not counted, and the party is entitled to perform the act on the Monday following. *Salter v. Burt*, 530.

2. **SUNDAY.**—If a NOTE WHICH FALLS DUE ON SUNDAY has no days of grace, demand for payment can not be lawfully made until the following Monday, and if made before is void. If, however, the note is entitled to three days of grace and the last of these falls on Sunday, the note is payable, and demand for payment may lawfully be made on the Saturday preceding. *Id.*

HUSBAND AND WIFE.

1. **HUSBAND'S POWER OVER WIFE'S PROPERTY ACQUIRED BY DESCENT.**—Property which comes to a wife by descent does not vest absolutely in the husband. He may make it absolutely his own by reducing it to possession, and may release or assign it for a valuable consideration by a deed to which she is not a party; but, until he reduces it to possession, or in some way bars her right, he has only a qualified interest in it, and if he dies first the right survives to her. *Parsons v. Parsons*, 362.
 2. **DEED TO HUSBAND AND WIFE** gives them an estate in fee, not as joint tenants, but as tenants of the entirety with the right of survivorship. Neither can alien without the other. *Jackson v. McConnell*, 439.
 3. **LEASE BY HUSBAND WHO IS A TENANT BY ENTIRETIES** with his wife is valid to bring ejectment upon, though she did not join in such lease. *Id.*
- See CO-TENANCY, 4; DOWER, 1; EQUITY, 1, 2, 21; JURISDICTION, 10; MARRIAGE AND DIVORCE; MARRIED WOMEN; SLANDER, 4; SPECIFIC PERFORMANCE, 3; WITNESSES, 4-6

ILLEGAL CONTRACTS.

See CONTRACTS, 5; NEGOTIABLE INSTRUMENTS, 9.

ILLEGITIMATE CHILDREN.

See PARENT AND CHILD.

IMPLIED COVENANTS.

See COVENANTS, 1-4.

IMPRISONMENT.

See DURESS, 2.

IMPRISONMENT FOR DEBT.

See STATUTES.

IMPROVEMENTS.

No COMPENSATION WILL BE ALLOWED IN EQUITY FOR IMPROVEMENTS put upon land by one who has entered under a contract to obtain the title, which he has, subsequently to his entry, repudiated. *French v. Seely*, 758.

INDICTMENT.

See ADULTERY, 3, 5.

INDORSEMENT.

See NEGOTIABLE INSTRUMENTS.

INFANCY.

1. **INFANCY, RATIFICATION OF CONTRACTS MADE DURING.**—Mere declarations of intention of a party to perform a contract entered into by him during infancy, when made to a third person in no way interested in the matter, are not evidence of such ratification of the contract as will render him liable thereon; to constitute a ratification there must be either a direct promise, after the infant comes of age, to the party himself or to his agent, or acts and declarations or acts alone, showing a clear recognition and confirmation of the contract. *Hoit v. Underhill*, 380.
2. **WHERE THE RIGHTS OF INFANTS APPEAR UPON THE FACE OF THE MASTER'S REPORT** as to title in a partition suit, the court will correct an error into which the master has fallen as to the extent of their interests in the premises partitioned, although no formal exception has been pleaded to the report by their guardian *ad litem*. *Safford v. Safford*, 633.

See CONSTITUTIONAL LAW, 12.

INJUNCTION.

1. **INJUNCTION AGAINST ENFORCING THE MANDATE OF THE COURT OF APPEALS** may be granted by the circuit court, if such mandate be obtained surreptitiously or by surprise, or contrary to contract. *Bank of Kentucky v. Hancock*, 76.
2. **AN INJUNCTION TO PREVENT A THREATENED OBSTRUCTION OF ANCIENT LIGHTS**, will be granted by a court of equity, upon an application disclosing facts sufficient to justify the issuance of the writ. *Robeson v. Pittenger*, 412.
3. **PROCEEDING BY INJUNCTION TO PREVENT OR REMOVE A PRIVATE NUISANCE**, is limited in chancery to those cases in which the nuisance complained of is prejudicial to some right which the other party had long previously enjoyed, and there must exist a pressing necessity, or the right must have been previously established by law, to entitle the party to call to his aid the jurisdiction of this court. *Id.*
4. **INTERFERENCE BY INJUNCTION WHERE THERE MAY ALSO EXIST A REMEDY AT LAW**, is a matter, the policy of which, in a court of chancery, must depend upon the particular circumstances of each case. *Id.*
5. **COURT OF EQUITY WILL INTERFERE BY INJUNCTION** to restrain a party from enforcing a legal right against all equity and conscience. *Jones v. Hardesty*, 180.

See CONSTITUTIONAL LAW, 1, 2, 4, 5, 8; EQUITY, 9; JUDGMENTS, 9, 10, 12; LANDLORD AND TENANT, 2; PLEADING AND PRACTICE, 4.

INSANITY.

1. **INSANITY OF THE DEFENDANT MAY BE PROVED UNDER THE GENERAL ISSUE** in an action for slander. *Yeates v. Reed*, 43.
2. **GENERAL REPUTATION WITH RESPECT TO DEFENDANT'S SANITY** is inadmissible in evidence, where insanity is sought to be proved. *Id.*

INSOLVENCY.

See SALES, 10.

INSTRUCTIONS.

See INSURANCE—MARINE, 7; JUDGMENTS, 17.

INSURANCE—FIRE.

1. **INSURER HAS RIGHT TO BE INFORMED OF EVERY FACT** creating or increasing the risk. *Walden v. Louisiana Ins. Co.*, 116.
2. **OMISSION TO NOTIFY INSURER OF RECENT ATTEMPT TO BURN A BUILDING** next to that on which insurance was sought, was held to vitiate the policy obtained. *Id.*
3. **ALTERATION IN PREMISES INSURED.**—Where, in an action upon a policy of insurance issued by a company incorporated under an act which provided that if any alteration shall be made in any building by the proprietor thereof, after insurance has been made thereon by the company, whereby it may be exposed to greater risk from fire, the insurance shall be void unless an additional premium and deposit after such alteration be settled and paid to the company, but no alterations or repairs not increasing the risk shall affect the insurance, the jury were instructed, that the alteration must have been such that a higher rate of premium would have been demanded to insure the building in its altered state than before, otherwise the alteration would not be material, it was held that such instruction was correct, and that in case of a material alteration it was not necessary, in order to avoid the policy, for the company to show that the loss had been occasioned by the alteration. *Merriam v. Middlesex Mutual Fire Ins. Co.*, 252.

INSURANCE—MARINE.

1. **TESTIMONY BY ONE SURVEYOR OF THE DECLARATIONS AND OPINIONS OF ANOTHER**, while engaged in making a survey of a vessel in a foreign port, which has been injured, is inadmissible on the part of the insured in an action against the insurers of the vessel, it appearing that the deposition of such other surveyor is in the possession of the former. *Orrok v. Commonwealth Ins. Co.*, 271.
2. **WHERE THE INJURY SUSTAINED BY A VESSEL** insured is not of such a nature and extent as to warrant an abandonment, it is not such a case of necessity as will warrant a sale by the master. *Id.*
3. **VALUATION OF A VESSEL IN A POLICY OF INSURANCE** is conclusive as to her value, in determining whether the expenses of repairing an injury sustained by her will exceed half her value and thus constitute a technical total loss. *Id.*
4. **WHERE A POLICY OF INSURANCE PROVIDES** that the insured shall not have a right to abandon unless the loss exceeds half the amount insured, and the valuation in the policy includes the premium, the loss must exceed one half the whole valuation, including the premium, to authorize an abandonment. *Id.*
5. **WHERE IT IS NECESSARY TO RAISE MONEY** at marine interest for the purpose of repairing a vessel insured, the rule of deducting one third new for old, is to be applied to such interest, in determining the amount for which the insurers are liable. *Id.*
6. **VESSEL'S PROPORTION OF ITEMS OF GENERAL AVERAGE** is not to be added to the partial loss, in order to make up the loss of fifty per cent., which authorizes an abandonment. *Id.*
7. **AN INSTRUCTION TO THE JURY IN AN ACTION** upon a policy of insurance, the question being whether the loss was partial or constructively total,

that if they found for a total loss, to state the item of damage which in their opinion exceeded one half the sum insured, is not erroneous or irregular. *Id.*

8. EVIDENCE IN SUCH AN ACTION upon the question whether the cost of repairs would exceed half the value of the vessel, that she would have been of less value after being repaired than she was before the injury, is inadmissible. *Id.*
9. INSURANCE—WHAT IS A WARRANTY.—Stipulation in a policy on a vessel that the insurers are not to be "liable for any damage to or from her sheathing" is not equivalent to a representation that the vessel has sheathing; but even if it were, the representation is immaterial, if it appears that sheathing would be regarded as of no benefit to the vessel. *Martin v. Fishing Ins. Co.*, 220.
10. INSURANCE ON VESSEL "AT AND FROM CALAIS, MAINE, ON JULY 16, to, at, and from all places to which she may proceed in the coasting business for six months," attaches on the day named, whether the vessel was then prosecuting her voyage or not, if it appears that the intent was to insure for a stated time, irrespective of the place where the vessel happened to be. *Id.*
11. WAIVER OF PRELIMINARY PROOFS MAY BE PRESUMED in an action for insurance, if the insurers always declined to pay on some other ground, and had never objected on account of any defect or deficiency in the preliminary proofs. *Id.*
12. PRESUMPTION OF SEAWORTHINESS DURING THE ENTIRE RISK arises from proof of seaworthiness at its commencement. *Id.*
13. PREVENTION OF VESSEL BY A BLOCKADING SQUADRON from entering her port of destination, and requiring her to return to her port of departure, entitles her owners to recover on a policy by which she was insured against "the arrests, restraints, and detentions of kings, princes, people," etc. *Vigers v. Ocean Ins. Co.*, 118.
14. A RESTRAINT EXISTS, THOUGH THERE BE NO SEIZURE, if the power of the blockading squadron is applied so effectually and directly as to break up the voyage. *Id.*
15. INSURANCE FOR WHOM IT MAY CONCERN, was effected by L. and made payable to himself. He was then the owner of one half of the vessel and had indorsed notes given for the purchase money by his co-owner. His object was to indemnify himself from loss for this indorsement. Afterwards his co-owner gave L. a bill of sale. Still later a loss occurred. It was held that L. was entitled to recover the whole amount of the loss. *Martin v. Fishing Ins. Co.*, 220.
16. INTEREST AT THE TIME OF THE LOSS is all that is required to entitle plaintiff to recover on a policy issued and payable to him "for whom it may concern." *Id.*

See SHIPPING, 8-10.

INTERNATIONAL LAW.

THE ADMISSION BY US OF THE EXISTENCE OF A CIVIL WAR between two foreign powers, entitles both to the sovereign rights of war, and to claim from us the obligations of neutrality, although we have not acknowledged the independence of one of the powers. *Walley v. Schooner Liberty*, 114.

See JURISDICTION, 1.

JOINT-STOCK ASSOCIATIONS.

See CORPORATIONS, 10.

JOINT TENANTS.

See CO-TENANCY; HUSBAND AND WIFE, 2.

JUDGMENTS.

1. WHERE COURT HAS JURISDICTION IN PERSONAM, its decree will be presumed valid, and will not be deemed void because it orders a sale of the property as in proceedings *in rem*. Though no lien existed, a decree of sale made when all the owners are before the court, is binding on them and will transfer title if the property be sold in pursuance thereof. *Case v. Woolley*, 54.
2. JUDGMENT OF A COURT HAVING JURISDICTION of a cause is not the subject of collateral attack, although erroneous, but is valid and effective until reversed. *Banister v. Higginson*, 134.
3. JUDGMENT AGAINST ONE OF THE OBLIGORS OF A SEVERAL BOND is no bar to an action against another, unless there has been a satisfaction or payment. *Armstrong v. Prewitt*, 338.
4. RECOVERY FOR PART OF AN ENTIRE DEMAND merges the whole and bars any further recovery thereof. *Bendernagle v. Cocks*, 448.
5. UNSATISFIED JUDGMENT AGAINST ONE OF TWO JOINT DEBTORS does not bar a subsequent action against the other where the latter was, at the time when the first suit was brought, without the jurisdiction of the state. *Olcott v. Little*, 357.
6. JUDGMENT IN FAVOR OF A CORPORATION ESTABLISHES ITS CORPORATE EXISTENCE as against the parties to the suit; and if the defendant be an administrator, the existence of the corporation can not, in the absence of collusion, be controverted by his sureties in an action upon the same judgment. *Heard v. Lodge*, 197.
7. JUDGMENT AGAINST A FIRM WILL NOT BE VACATED because it was unauthorized by one of the firm, unless the motion to vacate was made by the member against whom the judgment was entered without his authority. The judgment is good against the partner who assented to it, though it may be inoperative against his copartner. *St. John v. Hobbs*, 603.
8. JUDGMENT BY DEFAULT AGAINST A SHERIFF for not returning an execution within the time limited by the court, has by the act of 1794, c. 54, sec. 1, the same effect, operation, and validity as a judgment on the verdict of a jury. *Fowler v. Lee*, 172.
9. JUDGMENT AGAINST SHERIFF FOR NOT RETURNING EXECUTION will not be enjoined merely because the judgment debtor has obtained an injunction to stay proceeding, on the judgment upon which such execution issued; and where the sheriff applies for an injunction against the judgment against himself, the court may inquire into the grounds on which the debtor obtained the first injunction. *Id.*
10. COURT OF EQUITY WILL NOT ARREST EXECUTION of the judgment against the sheriff unless it would be unjust and unconscientious to enforce it. *Id.*
11. MISCONDUCT OF SHERIFF IN FALSELY RETURNING service of a writ which

he never served, is not of itself sufficient ground for setting aside the judgment founded upon such false return. *Id.*

12. PARTY SEEKING TO ENJOIN A JUDGMENT on the ground that he can not safely pay it, should file a bill of interpleader against the person who appears to be entitled, and pay the money into court for the person who shows his right to receive it. *Id.*
13. LEVY OF A FIERI FACIAS FOLLOWED BY THE TAKING and forfeiture of a forthcoming bond constitutes full satisfaction of the judgment, and therefore a second execution will be void. *Witherspoon v. Spring*, 310.
14. JUDGMENT MERGES DEBT DUE TO THE PARTY in whose favor it is rendered; but as to parties whose debts it is taken to secure, it is merely a collateral security for the payment thereof, and does not impair their rights to prosecute their claims either at law or in equity. *Harris v. Alcock*, 158.
15. JUDGMENT CONFESSED IN FAVOR OF AN AGENT, for the benefit of himself and his principal, is not void because the record does not disclose the trust upon which such agent holds the judgment; and parol evidence may be introduced to prove the trust. *Id.*
16. JUDGMENT OF A JUSTICE MAY BE FILED IN THE CLERK'S OFFICE so as to create a lien upon the lands of the judgment debtor at any time after it has been rendered, but the lien can not be enforced until execution against the goods has been returned unsatisfied. *Wineland v. Coonce*, 320.
17. A JUDGMENT AGAINST A LUNATIC on process served upon him alone, and not on his guardian, though erroneous, is not void. *Allison v. Taylor*, 68.
18. ORDER REFUSING TO VACATE IRREGULAR JUDGMENT will be reviewed on appeal, where it appears from the record that such order was made by the lower court on the ground of a want of authority to vacate the judgment, and not in the exercise of a discretionary power. *Winslow v. Anderson*, 651.
19. JUDGMENT BY DEFAULT AGAINST THE PRINCIPAL AND SURETY upon a bond given for the appearance of a party in court at a particular day, is irregular if rendered prior to the day prescribed for the appearance of such person in the bond. *Id.*
20. AN IRREGULAR JUDGMENT MAY BE VACATED at a term of court subsequent to that at which it was rendered, upon motion made in due form for that purpose. *Id.*
21. AN IRREGULAR JUDGMENT UNTIL SET ASIDE IS EFFECTIVE, subsisting, and valid as to all the world. *Id.*
22. JUDGMENT OF A COURT OF RECORD IS CONSIDERED TO HAVE BEEN RENDERED on the first day of the term by relation, irrespective of the day upon which it may, in fact, have been rendered. *Farley v. Lea*, 680.
23. JUDGMENT BY CONFESSION IS VALID without previous process, and is presumed to have been entered on the first day of the term, although the writ on which such judgment was confessed was not issued until afterwards. *Id.*
24. JUDGMENT NEED NOT BE PROVED TO JUSTIFY A SALE UNDER EXECUTION issued upon such judgment, but in an action against an officer it is sufficient for him to show that in making the sale he acted under the authority of the writ, in obedience to the mandate of the court. *Id.*
25. JUDGMENT AGAINST TWO DEFENDANTS jointly tried upon an indictment in a criminal prosecution, which imposes a fine on each, but is silent

upon the matter of costs, is a several judgment against each for the entire costs, and either party may appeal without the other. *State v. Jolly*, 656.
See ATTACHMENT, 3; ATTORNEY AND CLIENT, 1, 2; EJECTMENT; EQUITY, 9-11, 16; EVIDENCE, 1; EXECUTIONS, 1, 6, 9, 14, 15; FRAUD, 1; JURISDICTION, 5; LANDLORD AND TENANT, 2; NOTICE 3, 9; SURETSHIP, 8, 9, 13.

JURISDICTION.

1. PUBLIC ARMED VESSEL OF FOREIGN STATE at peace with the United States, is exempt from the jurisdiction of our local tribunals while enjoying in a friendly manner the hospitality of our waters. *Walley v. Schooner Liberty*, 114.
 2. PETITION AND ACCOUNT FOR SALE OF REAL ESTATE presented to a surrogate, if sufficient in form, confer jurisdiction; and, in a collateral proceeding, the court can not inquire whether the petition and account were false. *Atkins v. Kinnear*, 534.
 3. THE DIFFERENCE BETWEEN ERROR AND WANT OF JURISDICTION is this: for the former, proceedings can not be collaterally avoided, while for the latter, they are everywhere void. *Id.*
 4. THE ACCOUNT OF DEBTS REQUIRED TO BE GIVEN THE SURROGATE, is sufficient to vest him with jurisdiction to order a sale, if any one of the several items of debt be sufficiently stated. *Id.*
 5. DISTRICT COURT OF THE UNITED STATES is of special and limited jurisdiction, and its judgment will be deemed void unless the record shows that it had jurisdiction. *Case v. Woolley*, 54.
 6. MARITIME JURISDICTION is, by the constitution and laws of the United States, vested in its district courts, concurrently, however, with the common law courts, in cases wherein the common law remedy is adequate and proper. *Id.*
 7. A CIVIL MARITIME CASE arises on the sea, or from some act or contract pertaining to its commerce or navigation. *Id.*
 8. A CIVIL CASE ARISING WHERE THE TIDE RISES AND FLOWS, though within a county, is a case of maritime or admiralty jurisdiction, within the meaning of our national constitution and laws. *Id.*
 9. TO GIVE AN INTERIOR COURT JURISDICTION OVER AN ACTION OF ASSUMPSIT, the consideration as well as the promise must be alleged to be within the jurisdiction of the court. An omission of this allegation is fatal even after verdict. But an allegation that the defendant at, etc., and within the jurisdiction of this court, was indebted to plaintiff for goods, wares, and merchandise by plaintiff sold and delivered, and then and there promised, etc., sufficiently shows that the consideration as well as the promise arose within the jurisdiction of the court. *Grover v. Gould*, 533.
 10. COURTS OF NEW HAMPSHIRE HAVE JURISDICTION TO DISSOLVE MARRIAGE for the adultery of the husband committed in another state, subsequent to his desertion of the wife and while she was an actual resident of New Hampshire, the marriage having been contracted there. *Frary v. Frary*, 395.
- See** ADMIRALTY, 1, 2; CHARITABLE USES, 1, 4; EQUITY, 1-4, 14, 19; EXECUTORS AND ADMINISTRATORS, 7, 9, 10, 18; JUDGMENTS, 1, 2, 17; MARRIAGE AND DIVORCE, 6-8; PROBATE COURT; PROCESS, 1, 2; SLANDER, 1.

JURY.

1. **FINDING THAT THE PLAINTIFF OUGHT TO RECOVER** will operate as a finding that there has been an assignment of the bond sued upon, where the plaintiff sues in the character of assignee. *Armstrong v. Prewitt*, 338.
2. **JURY NEED NOT GIVE SAME WEIGHT TO THE DIFFERENT PARTS** of the confession of a prisoner, and may even totally disregard that part of the confession which is favorable to the prisoner, if it is contrary to the experience of mankind, or is contradicted by other evidence stronger than itself. *Bower v. State*, 325.
3. **WHERE, AT THE TRIAL** of an action against an insurance company, it appeared that the sheriff, who had returned a talesman to serve on the jury, was a stockholder in such company, and this was known to plaintiff's counsel soon after the trial began, but no objection was made until some time after, this was held to amount to a waiver of any exception to the competency of such juror. *Orrok v. Com. Ins. Co.*, 271.

JUSTICES' COURTS.

See PLEADING AND PRACTICE, 9.

LAND.

See DEEDS, 4.

LANDLORD AND TENANT.

1. **TENANTS AND QUASI TENANTS CAN NOT LEGALLY ATTORN** to a stranger, take shelter under an adverse claim, nor controvert their landlord's title. *Chambers v. Pleak*, 78.
2. **AFTER JUDGMENT OF COURT AGAINST THE LANDLORD'S TITLE**, the tenant may purchase or take shelter under the adverse title, but he probably can not do so while an injunction against such judgment is in force. *Id.*
3. **WHERE A TENANT AT WILL COMMITS WASTE**, it is a determination of the will, and an act for which trespass *quare clausum fregit* will lie by the reversioner. *Daniels v. Pond*, 269.
4. **MANURE MADE ON A FARM** in the ordinary course of husbandry, consisting of the collections from the stable and barnyard, or of composts formed by an admixture of these with soil or other substances, is by usage, practice, and general understanding, so attached to and connected with the realty, and in the absence of any express stipulation on the subject, an outgoing tenant at will of the farm has no right to remove the same or to sell it to be removed. *Id.*
5. **SALE THEREOF BY SUCH TENANT** vests no title in the vendee, and is a tort for which the landlord may have redress. *Id.*
6. **THIS RULE DOES NOT APPLY TO MANURE** made in a livery stable, or in any manner not connected with agriculture or made in the ordinary course of husbandry. *Id.*
7. **TENANT AT WILL OF A FARM IS ENTITLED** to the possession of the manure made thereon in the ordinary course of husbandry, for the purpose of using it on the farm; but if he sells it, the right of possession thereto vests in the lessor or his grantee, and they may maintain trespass *de bonis asportatis* against the vendee for removing it. *Id.*
8. **TENANT FOR YEARS, OR FROM YEAR TO YEAR, WHO HOLDS OVER**, without any new stipulations, after the expiration of his term, impliedly holds

subject to all the covenants of the lease which has expired, so far as they are applicable to his new situation. *De Young v. Buckman*, 156.

See STATUTE OF FRAUDS, 3; STATUTE OF LIMITATIONS, 4, 5.

LARCENY.

See CRIMINAL LAW, 3, 4.

LATERAL SUPPORT.

See BOUNDARIES, 6.

LAW OF NATIONS.

See INTERNATIONAL LAW.

LEASES.

See COVENANTS, 1, 4; HUSBAND AND WIFE, 2.

LEGACIES.

See WILLS.

LEX DOMICILII.

See MARRIAGE AND DIVORCE, 6-8.

LEX FORI.

See CONFLICT OF LAWS, 1-5.

LIABILITY.

See COMMON CARRIERS, 1, 4, 5, 7, 9, 10, 15-17; EXCISEDUTORS, 2, 4; FEROUS ANIMALS.

LIENS.

See ATTORNEY AND CLIENT, 3; CONTRACTS, 2; JUDGMENTS, 16; MORTGAGES; NOTICE, 8, 9; PARTNERSHIP, 4; PLEADING AND PRACTICE, 10; SHIPPING, 2-6; TROVER; VENDOR AND VENDER, 5.

LUNATICS.

See INSANITY; JUDGMENTS, 17.

MALICIOUS MISCHIEF.

See CRIMINAL LAW, 9.

MANURE.

See LANDLORD AND TENANT, 4-7.

MARITIME LAW.

See JURISDICTION, 6-8; SHIPPING.

MARKET OVERT.

See SALES, 8.

MARRIAGE AND DIVORCE.

1. ADMISSION MADE BY WIFE TO HER HUSBAND THAT SHE HAD COMMITTED ADULTERY, is not competent, unsupported by other proof, to sustain the charge, in an action for divorce upon that ground. *Miller v. Miller*, 417.
2. POSITIVE PROOF THAT CONFESSION OF GUILT WAS MADE THROUGH FEAR is not required upon the part of the wife, in order to negative the effect of such confession, but it may be inferred from her husband's general treatment of her. *Id.*
3. DECREE OF DIVORCE OBTAINED BY WIFE against her husband upon the ground of adultery while he was confined in the state prison upon conviction of a felony, will not be opened for the purpose of enabling the defendant to set up a condonation of the adultery as a defense. *Hofmire v. Hofmire*, 611.
4. WHETHER THE COHABITATION OF A WIFE WITH HER HUSBAND after his private confession to her of an act of adultery, but which she has no means of proving so as to justify her in leaving his bed and board, and to protect her friends who might receive and harbor her against his will, is such a condonation of the offense as will bar her suit for a divorce, upon a subsequent discovery of the means of establishing his guilt, *quare Id.*
5. ALIMONY MEANS, IN NEW HAMPSHIRE, THE PROVISION or allowance made to the wife upon a divorce. *Parsons v. Parsons*, 362.
6. RIGHT TO DIVORCE IS REGULATED BY THE LAW OF DOMICILE of the parties at the time that the offense against the marital relations is committed, whether or not the marriage was contracted elsewhere. *Dorsey v. Dorsey*, 767.
7. POWER TO GRANT A DIVORCE FOR A PAST TRANSGRESSION is not taken away from the tribunals of the jurisdiction in which the offense occurred, by a subsequent change of domicile. *Id.*
8. DIVORCE WILL NOT BE GRANTED IN ONE JURISDICTION for an offense committed while the parties were domiciled in another. *Id.*

See JURISDICTION, 10.

MARRIED WOMEN.

1. SEPARATE ESTATE OF MARRIED WOMAN, in the hands of her trustees, is, in equity, answerable for debts contracted for its benefit. If property be purchased with the proceeds of wife's separate estate and thereby becomes her separate property, a debt contracted with respect thereto is chargeable on her separate estate. *Dyett v. N. A. Ins. Co.*, 598.
2. ANSWER OF MARRIED WOMAN IN A SUIT RESPECTING HER SEPARATE ESTATE, in which she is joined with her husband and to which he alone swears, is binding upon her with respect to the admissions therein made. *Id.*
3. WIFE MARRIED IN THE STATE OF NEW HAMPSHIRE MAY LAWFULLY RETURN to and reside in it, upon being deserted by her husband in another state, where they had their domicile. *Frary v. Frary*, 395.

See ACKNOWLEDGMENTS, 2; PARTNERSHIP, 6.

MASONIC LODGE.

See CORPORATIONS, 8, 9.

MASTER AND SERVANT.

1. MASTER IS NOT LIABLE FOR WILLFUL MISCHIEF of his servant. *Wright v. Wilcox*, 507.
2. TO CHARGE THE MASTER FOR THE ACT OF HIS SERVANT, it must be shown that the relation of master and servant subsisted between them in the particular affair. *Id.*
3. FOR CARELESS MISTAKE OF A SERVANT, either of omission or commission, while in the discharge of his master's business, the latter is answerable. *Id.*
4. WILLFUL ACT OF A SERVANT is deemed to be a departure from the master's business. *Id.*
5. IN AN ACTION ON THE CASE AGAINST A MASTER AND SERVANT JOINTLY, no recovery can be had against the former, if the injury resulted from the willful malicious act of the latter. *Id.*
6. ONE IS NOT DEEMED A CLERK, where he only delivers the goods manufactured by his employer and keeps memoranda of such delivery. *Sickles v. Mather*, 521.

MEASURE OF DAMAGES.

See AGENCY, 2; EXERCUTIONS, 5.

MERGER.

See JUDGMENTS, 4, 14.

MILLS AND MILL-DAMS.

See WATERCOURSES, 8-11.

MISREPRESENTATIONS.

See COMMON CARRIERS, 4; FRAUD, 2, 3.

MISTAKE.

1. MONEY PAID UNDER A MISTAKE OF LAW, or voluntarily paid with a knowledge, or means of knowledge, of the facts, can not be recovered back. *Norton v. Marden*, 132.
2. MISTAKE OF FOREIGN LAW is regarded as a mistake of fact. *Id.*
3. WHERE PARTIES CONTRACT UNDER A MUTUAL MISTAKE of the facts supposed to exist, there being no fraud and no beneficial interest obtained, the party who pays the money may recover it back; but if any benefit has been derived by such a party, no recovery can be had. *Id.*
4. MISTAKE IN A DEED OR WRITTEN CONTRACT will not be relieved against unless express proof be adduced as to the intention of the parties. *Moore v. Vick*, 301.

See ASSUMPSIT, 1; MASTER AND SERVANT, 3.

MORTGAGES.

- A MORTGAGEE WHO HAS BEEN GUILTY OF A FRAUDULENT CONVEALMENT, which deprives him in equity of the right to enforce his lien against the premises mortgaged in the hands of a purchaser from the mortgagor, can not, by a subsequent assignment of the mortgage, give to the assignee a right to enforce such lien. *L'Amoureux v. Vandenburg*, 635.

See ATTORNEY AND CLIENT, 3; EQUITY, 5, 6; ESTOPPEL, 1; TENDER, 1.

MUNICIPAL CORPORATIONS.

See STATUTE OF LIMITATIONS, 9.

MURDER.

See CRIMINAL LAW, 5.

NAVIGABLE RIVERS.

See WATERCOURSES, 1-5.

NE EXEAT.

NE EXEAT WILL BE DISCHARGED, as of course, upon the defendant giving security to answer the complainant's bill, and to render himself amenable to the process of the court pending the litigation, and to such process as may be issued to compel a performance of the final decree. *McNamara v. Dwyer*, 627.

See EXECUTORS AND ADMINISTRATORS, 3.

NEGLIGENCE.

See CASE; COMMON CARRIERS, 1, 8, 15; EQUITY, 5; FEROCIOUS ANIMALS; SHIPPING, 2.

NEGOTIABLE INSTRUMENTS.

1. **PAROL DECLARATION BY THE HOLDER** of a promissory note to a surety, after the note has become due, that he will exonerate him and look to the principal, is a good defense in an action by the holder against the surety. *Harris v. Brooks*, 254.
2. **WHERE THE RELATION OF THE MAKERS** is not apparent on the face of a note, parol evidence is admissible to prove that the defendant signed as surety, and that this was known to the holder at the time he declared that he would look to the principal for payment. *Id.*
3. **NOTE TRANSFERABLE BY DELIVERY, IF NOT OVERDUE OR APPARENTLY DISHONORED**, may, in the ordinary course of business, in good faith, and for valuable consideration, be transferred so as to vest valid title in the transferee, although stolen from the true owner, or deposited with the transferor for some special purpose, and without authority to transfer it. *Wheeler v. Guild*, 231.
4. **PAYMENT OF A NOTE AT MATURITY TO THE APPARENT HOLDER IS VALID**, he having the legal title, and the payor having no notice of any defects in such title; but the person to whom payment is so made must have actual possession of the note, ready to be delivered, and must surrender it, otherwise the payment will not be valid unless to the true owner. *Id.*
5. **ACTION UPON A NOTE PAYABLE "to the cashier of the Commercial bank,"** may be maintained by the bank as promisee, it appearing that the consideration proceeded from the bank. *President etc. Com. Bank v. French*, 280.
6. **PROMISSORY NOTE SIGNED BY ONE FOR HIMSELF AND ANOTHER**, may be declared on as the note of both, provided authority to execute the note is shown. *Olcott v. Little*, 357.
7. **INDORSER RESIDING IN THE PLACE WHERE THE NOTE IS DISHONORED**, is entitled to personal notice of the dishonor, or in case he is temporarily

absent, to have the notice left at his dwelling-house or place of business. *Wilcox v. McNutt*, 304.

8. **USAGE OF THE NOTARIES TO NOTIFY RESIDENT INDORSERS** through the post-office, can not deprive such indorser of his right to personal notice. *Id.*
9. **ILLEGALITY OF CONSIDERATION, NOTE WHEN VOID FOR.**—Where any part of the consideration of a note consists of an agreement to discontinue a criminal prosecution, such note is void. *Shaw v. Spooner*, 348.
10. **DRAWERS AND INDORSERS OF BILL PAYABLE AT SIGHT ARE RELEASED** from liability by unreasonable delay in presenting it for acceptance or payment. *Allen v. Seydam*, 555.
11. **ACCEPTANCE OF BILL OF EXCHANGE** by the drawee, is presumptive evidence that the latter has effects of the drawer in his hands. *Kendall v. Galvin*, 141.
12. **WRITTEN ORDER, DATED AND SIGNED**, directing one person to pay to another a specified sum, and to charge the same to account of drawer, is a bill of exchange, although it is neither made payable to order or bearer, nor contains the words value received, nor is made payable on a day certain, nor at any particular place. *Id.*
13. **ACCEPTOR OF A BILL OF EXCHANGE** in order to recover from the drawer the amount thereof after payment, must overcome the presumption, arising from the acceptance, that he has effects of the drawer in his hands. *Id.*
14. **DRAFT EXCEEDING THE AMOUNT DUE**, and not corresponding to any sum which will become due, need not be accepted by the drawee, and if not accepted, constitutes no basis for an action against him by the payee. *Gibson v. Cooks*, 194.
15. **CHECKS ARE GOVERNED**, in several particulars, by the rules applicable to inland bills of exchange payable on demand, or at a specified time after sight. *Smith v. Jones*, 527.
16. **INDORSER OF A CHECK** is not liable unless due diligence has been used in presenting it and giving notice of the presentment and dishonor. *Id.*
17. **PRESENTMENT OF A CHECK FOR PAYMENT** should be made on the day it is received, or on the next day, if the parties reside in the same place; when payment is to be made at a different place from that where the check is negotiated, it should be forwarded by mail on the same or the next succeeding day, for presentment. *Id.*
18. **IN PRESENTING A CHECK** no greater diligence is required than in presenting bills of exchange for payment. *Id.*
19. **LACHES IN PRESENTING A CHECK WILL NOT BE PRESUMED**, in an action by a second indorsee; if there was negligence on the part of any prior holder the defendant must prove it, if he wishes to exonerate himself thereby. *Id.*
20. **SPACE OF TIME IN WHICH A CHECK MAY BE KEPT IN CIRCULATION** before presentment, without discharging the parties, is not settled. Several cases on this subject are here adverted to. Certainly the fact that the check was in circulation four or five days before it was sent to be presented will not release the indorsees. *Id.*
21. **CERTIFICATE OF NOTARY** that he "deposited in the post-office notices of the foregoing protest, for Horace Jones, New York," is proof that the notice was directed to Horace Jones. *Id.*

22. POSTDATED CHECK IS PAYABLE ON THE DAY IT BEARS DATE, without grace. *Satter v. Burt*, 530.

See AGENCY, 1-4; ASSIGNMENTS OF CONTRACTS, 1, 4; CRIMINAL LAW, 8; HOLIDAYS, 2; SURETYSHIP, 7; TRUSTS AND TRUSTEES, 5.

NEUTRALITY.

See INTERNATIONAL LAW.

NEW TRIAL.

1. APPLICATION FOR A NEW TRIAL IS ADDRESSED TO THE LEGAL DISCRETION of the court, and will not be granted, though the evidence might have justified a different result, if the court is satisfied that substantial justice has been done between the parties. *Smith v. Shultz*, 33.
2. NEWLY DISCOVERED EVIDENCE IS NOT A GROUND FOR A NEW TRIAL where it is not conclusive in its character, or is merely cumulative. *Id.*

See CRIMINAL LAW, 7.

NOTARIES.

See NEGOTIABLE INSTRUMENTS, 8, 21.

NOTICE.

1. ACTUAL POSSESSION OF PARTY IS SUFFICIENT INTIMATION of his rights to put a purchaser upon inquiry as to the nature of such possession, and where he neglects to make it, equity charges him with the consequences of a knowledge of the title. *Hardy v. Summers*, 167.
2. NOTICE OF TITLE IMPARTED BY POSSESSION is restricted by the registration by the tenant of an evidence of title that would justify his possession. *Woods v. Farmere*, 772.
3. PURCHASER UNDER A JUDGMENT WILL NOT BE PRESUMED TO have examined the register's office for the debtor's will, and can not contend that as the terms of the will justified the tenant's possession, that possession was evidence of no further title. *Id.*
4. NO ONE WILL BE PRESUMED TO HAVE HAD KNOWLEDGE OF THE REGISTRATION of an instrument, which could not prejudice him, as his claims are paramount thereto. *Id.*
5. REGISTRATION BY AN EXECUTOR OF A WILL IN WHICH HE IS A DEVISEE will not operate to restrict the notice of title conveyed by his possession of the land devised, and to which he has claims paramount to those of the deviser. *Id.*
6. WHERE AN ORIGIN OF POSSESSION IS SHOWN DURING AN ANCESTOR'S LIFETIME, no presumption of seisin by descent can be made, in order to explain the possession. *Id.*
7. ACTUAL NOTICE OF TITLE CAN BE GIVEN by him only in whom the title is vested. *Id.*
8. ACTUAL NOTICE TO THE MASTER OF A BOAT of the existence of a lien against it, operates as constructive notice to its owners. *Cass v. Woolley*, 54.
9. IF CREDITORS WHO LIEN A BOAT HAVE NO NOTICE of a pre-existing lien,

a purchaser under their judgment becomes subrogated to their rights, and acquires title free of such lien though he had actual notice of it. *Id.*
 See COMMON CARRIERS, 3-5, 9, 10; ELECTIONS, 2; EXECUTIONS, 3-6, 14, 15; NEGOTIABLE INSTRUMENTS; PARTNERSHIP, 2; SALES, 9, 13; TRUSTS AND TRUSTEES, 3, 4.

NUISANCE.

1. THE RIGHT WHICH PRIVATE PERSONS HAVE TO ABATE A PUBLIC NUISANCE must be confined to the removal or destruction of that which is necessarily a nuisance or the cause of one in its present location. *Gray v. Ayres*, 107.
2. A HOUSE, NOT OF ITSELF A NUISANCE, can not be lawfully destroyed by private persons, because the use to which it is put is a public nuisance, as where persons assemble therein for immoral and unlawful acts. *Id.*
3. A DISTINCTION EXISTS BETWEEN A PHYSICAL NUISANCE, and one which consists of immoral and unlawful conduct carried on in a particular house; the former may be abated by force, while the latter can not. *Id.*

See INJUNCTION, 3.

OFFICES AND OFFICERS.

See ATTACHMENT, 1, 4, 5; EXECUTIONS, 3-5; SURETYSHIP, 14, 15; TRUSTS AND TRUSTEES, 5.

ORPHANS' COURTS.

See PROBATE COURT.

PARENT AND CHILD.

FATHER WHO HAS ASSUMED THE CARE AND EDUCATION OF THE ILLEGITIMATE CHILD OF HIS DAUGHTER, the custody of the child having been abandoned both by the mother and father, will stand in reference to the child *in loco parentis*, and may maintain an action for its abduction. *Morris v. Garnhart*, 762.

PAROL EVIDENCE.

See EVIDENCE, 2, 12; PROCESS, 4.

PARTIES.

See PLEADING AND PRACTICE, 5, 7, 10; PARTNERSHIP, 1.

PARTITION.

See CO-TENANCY, 4; ESTATES OF DECEASED PERSONS, 4; INFANCY, 2; PROBATE COURT, 3, 4.

PARTNERSHIP.

1. ALL PROPERTY AND RESPONSIBILITIES OF A PARTNERSHIP, by the death of a partner, devolve on the surviving partner, and in a suit in relation thereto, the personal representative of the deceased partner need not be made a party. *Jones v. Hardesty*, 180.
2. ONE PARTNER IS NOT BOUND BY A CONTRACT entered into by his copartner, after giving actual notice to the party proposing to make it that he will not be bound thereby, although the fruits of the contract have been enjoyed by the partnership, of which he is a member. *Monroe v. Conner*, 148.

3. **EXPRESS PROMISE FROM ONE PARTNER TO ANOTHER** in respect to contributing to the common stock or making advances thereto, may be enforced in an action at law; but an implied promise can not. *Townsend v. Go-wey*, 514.
4. **LIEN ON PARTNERSHIP PROPERTY FOR THE PAYMENT OF PARTNERSHIP LIABILITIES** arises at its acquisition, both between the partners and in favor of their creditors. *Sumner v. Hampson*, 722.
5. **LANDS MAY BE HELD IN PARTNERSHIP.** *Id.*
6. **DOWER WILL NOT BE ALLOWED WIDOW OF DECEASED PARTNER** in lands acquired as partnership property and required to pay the partnership liabilities. *Id.*

See JUDGMENTS, 7.

PART PERFORMANCE.

See RESCUEMENT OF CONTRACTS; STATUTE OF FRAUDS, 4, 5.

PATENTS.

See COVENANTS, 6.

PAYMENT.

See MISTAKE, 1-3; NEGOTIABLE INSTRUMENTS, 4.

PERFORMANCE.

See BONDS, 3.

PLEADING AND PRACTICE.

1. **AMENDMENT OF COMPLAINT, WHAT PROPER.**—Where a declaration contained a count for work and labor done and materials found, and the specifications of the plaintiff claimed the price of a carriage sold and delivered, an amendment thereto by filing a count upon an agreement by the defendant to take and pay for a carriage to be built to his order, is for the same substantive cause of action and is properly allowed. *Mizer v. Howarth*, 256.
2. **QUESTION OF VARIANCE BETWEEN ALLEGATIONS AND PROOFS** in a cause can not, since the act of 1832, c. 302, sec. 5, be considered in the court of appeals unless exceptions to the admissibility of the evidence or the sufficiency of the averments of the bill were filed in the court below. *Jones v. Hardesty*, 180.
3. **DECLARATIONS OF A PARTY, WHICH ARE DISCREDITED** by his own answer, are not entitled to any weight in the determination of a case. *Id.*
4. **ALLEGATIONS OF ANSWER, ON MOTION TO DISSOLVE INJUNCTION**, can be regarded only so far as they are responsive to the bill. *Hardy v. Summers*, 167.
5. **SUIT INSTITUTED BY PROCESS THAT DOES NOT RUN IN THE NAME OF THE STATE** may be dismissed upon motion of the defendant, though prior to the motion he has appeared in the action for other purposes; and though the statute authorizes like suits to be instituted "either by voluntary appearance and agreement of the parties or by process. *Little v. Little*, 317.
6. **PARTY CAN NOT COMPLAIN OF ERROR** unless it is to his prejudice, and if a defendant fails to give any evidence in support of his plea of payment,

he can not complain that there has been no finding on the plea. *Armstrong v. Prewitt*, 338.

7. **SUIT UPON A PROMISE TO PAY TO CERTAIN TRUSTEES** or their successors the amount of certain calls which may be made upon stock-subscribers must be brought in the name of the trustees to whom the promise was made, although their term of office has expired. *Townsend v. Govey*, 514.
 8. **REPLICATION IS BAD** if it neither traverses the plea nor states matters in avoidance. *Bank of Chillicothe v. Swayne*, 707.
 9. **AMENDMENTS TO PROCEEDINGS IN JUSTICES' COURTS** should be allowed with great liberality. *Johnston v. Fessler*, 738.
 10. **PARTIES TO A BILL TO ENFORCE A LIEN** should include all the owners of the subject of the lien; but the non-joinder of one of the owners ceases to be objectionable if the lien is released and no decree is made affecting his interest. *Case v. Woolley*, 54.
- See ACTIONS**, 1, 2, 4, 5; **ASSUMPSIT**; **ATTACHMENTS**, 1; **CASE**; **CRIMINAL LAW**, 1; **EMINENT DOMAIN**, 1, 6; **EQUITY**, 7, 13, 17, 19; **ESTATES OF DECEASED PERSONS**, 3; **INFANCY**, 2; **INSANITY**, 1; **JUDGMENTS**; **JURISDICTION**, 9; **JURY**; **MARRIED WOMEN**, 2; **MASTER AND SERVANT**, 5; **NE EXEAT**; **NEGOTIABLE INSTRUMENTS**, 5, 6; **NEW TRIAL**; **PARTNERSHIP**, 1, 3; **SLANDER**, 1-3, 5; **SPECIFIC PERFORMANCE**, 1, 2; **STATUTE OF FRAUDS**, 2; **TENDER**, 2; **TRESPASS**; **VENDOR AND VENDEE**, 1; **WITNESSES**.

POSSESSION.

See CO-TENANCY, 4; **COVENANTS**, 3, 4; **EJECTMENT**; **NOTICE**, 1-3, 6; **SALES**, 2, 3.

PRESCRIPTION.

See BOUNDARIES, 2, 7; **EASEMENTS AND SERVITUDES**, 6, 9; **WATERCOURSES**, 2.

PRESUMPTIONS.

See EASEMENTS AND SERVITUDES, 7; **EVIDENCE**, 7, 8.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PRIVILEGE OF WITNESSES.

See CONSTITUTIONAL LAW, 6.

PROBATE COURT.

1. **GRANT OF LETTERS OF ADMINISTRATION** by a judge of probate, who has a valid claim against the estate, is void for want of jurisdiction, although he has determined not to enforce such claim. *Sigourney v. Sibley*, 248.
2. **ADMINISTRATION GRANTED** by a judge of probate on an estate over which he has no jurisdiction, is not rendered valid by failing to take exception to his jurisdiction. *Id.*

2. **AUTHORITY CONFERRED BY STATUTE** upon the probate court to make partition of the real estate of a decedent whose estate is in course of settlement, is merely incidental to the general probate jurisdiction over the estate, and if the grant of administration is void for want of jurisdiction an order of partition is likewise void. *Id.*
4. **COURT OF PROBATE HAVING NO JURISDICTION** over an estate, but in which a special administrator has been appointed by a decree appealed from, and who acts by force of the statute during the appeal, is not the court of probate in which "the estate is settled, or in the course of settlement," within the meaning of the statute. *Id.*
5. **JURISDICTION OF A PROBATE COURT OF KENTUCKY IS PRESUMED, *prima facie***, from its assumption and exercise. *Fletcher v. Sanders*, 96.
See ESTATES OF DECEASED PERSONS, 3, 4.

PROCESS.

1. **WHEREVER A COURT OF INFERIOR AND LIMITED JURISDICTION** issues process in excess of its authority, its judge, together with the party at whose instance he has acted, is a trespasser with respect to all acts done in execution thereof. *Barkeloo v. Randall*, 46.
2. **AN INFERIOR COURT ENABLED BY STATUTE TO ISSUE CERTAIN PROCESS** after performance of prerequisites established by the statute, acts in excess of jurisdiction if it issues the process without those prerequisites having been performed. Thus where a statute enables a justice of the peace to issue a writ of domestic attachment upon the filing of a prescribed bond by the party applying for the writ, the justice acts in excess of jurisdiction if he issues the writ without the bond having been furnished, and is liable as a trespasser for the acts done under the writ. *Id.*
3. **AN OFFICER'S RETURN OF A LEVY** upon land, which does not show by whom the appraisers were appointed, is void, and no title passes by a sale in pursuance of such levy. *Banister v. Higginson*, 134.
4. **PAROL EVIDENCE IS NOT ADMISSIBLE** to show that such appraisers were appointed as required by law. *Id.*
5. **AMENDMENT OF SUCH RETURN** by showing by whom the appraisers were appointed will not be permitted if the rights of third persons will be affected thereby. *Id.*
6. **WHERE THE RETURN OF AN OFFICER** of a levy upon and sale of land is defective, no presumption arises from the lapse of sixteen years that the statutory requirements were complied with. *Id.*
7. **A SHERIFF WILL NOT BE HEARD TO CONTRADICT HIS OWN RETURN** upon an execution, though the suit in which he is offered for that purpose, is one between third parties. *Doe v. Snyder*, 311.

See PLEADING AND PRACTICE, 5.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PURCHASERS.

See NOTICE.

QUIET ENJOYMENT.

See COVENANTS.

RATIFICATION.

See CORPORATIONS, 5; INFANCY, 1.

REAL ESTATE.

See CONFLICT OF LAWS, 2; ESTATES OF DECEASED PERSONS, 4.

RECORDING.

See DEEDS, 6-9; EVIDENCE, 14; NOTICE, 2-5.

REDEMPTION.

See EXECUTIONS, 8.

REGISTRATION.

See NOTICE, 2-5.

RELIGIOUS SOCIETIES.

See CHARITABLE USES, 2-4; CORPORATIONS, 4, 6, 11-12.

REPLICATION.

See PLEADING AND PRACTICE, 8.

REPUTATION.

See INSANITY, 2.

RES ADJUDICATA.

See JUDGMENTS.

RESCISSION OF CONTRACTS.

PARTY MAY RESCIND ENTIRE CONTRACT after partial execution thereof, where the other party refuses to complete it, if the latter may be put in the same situation as before. *Lucy v. Bundy*, 359.

RETURN.

See ATTACHMENT, 4; JUDGMENTS, 8, 9, 11; PROCESS, 2, 5-7; TAXATION, 11.

SALES.

1. **AGREEMENT TO MANUFACTURE ARTICLE, NOT A SALE, WITHIN STATUTE OF FRAUDS.**—Where the defendant went to the plaintiff's shop, who had on hand a carriage partly completed, and it was agreed between them that the latter was to finish a carriage for the defendant in a fortnight, and the unfinished one was completed accordingly, and the defendant notified thereof and requested to take it away, such agreement is not a contract of sale but an employment of the plaintiff to construct an article for his employer, and therefore not within the statute of frauds, and need not be in writing. *Mixer v. Howarth*, 256.

2. OPEN AND SUBSTANTIAL CHANGE OF POSSESSION IS NECESSARY to make a sale of personal property valid as against creditors. *French v. Hall*, 341.
3. GIVING BACK POSSESSION OF PERSONAL PROPERTY TO VENDOR, after a sale thereof, upon a hiring, and for a temporary purpose, does not render such sale fraudulent, where there has been a visible and substantial change of possession. *Id.*
4. INNOCENT PURCHASER FROM A FRAUDULENT GRANTEE, paying a valuable consideration, will hold the property against the creditors of the fraudulent grantor. *Wineland v. Coonce*, 320.
5. PURCHASER OF GOODS FROM ONE HAVING NEITHER TITLE NOR AUTHORITY TO SELL, acquires no title. *Saltus v. Everett*, 541.
6. ONE WHO PARTS WITH THE TITLE TO PROPERTY BY A SALE, which has been procured by a fraud upon him, can not recover the property from a *bona fide* purchaser thereof, for value, from the fraudulent vendee, without notice of the fraud. *Per Verplanck, senator. Id.*
7. HONEST PURCHASER UNDER DEFECTIVE TITLE can not hold against the true owner. *Per Verplanck, senator. Id.*
8. LAW OF MARKET OVERT HAS NEVER BEEN ADOPTED IN THIS COUNTRY. Hence one can not generally transfer a better title than he himself has. *Per Verplanck, senator. Id.*
9. ABSENCE OF NOTICE OF CONFLICTING CLAIM, and of circumstances calculated to arouse suspicion, will not protect a *bona fide* purchaser for value, when he buys of one having neither title nor authority to sell, except in the case of money, bank bills, notes payable to bearer, and such other property as is transferable by mere delivery. *Per Verplanck, senator. Id.*
10. VENDOR'S TITLE IN GOODS IS NOT DIVESTED BY A SALE to a purchaser who conceals his insolvency, and, at the time of the purchase, has no intention to pay for them, or who, by the fraudulent aid of a creditor to whom he has confessed judgment, buys such goods in order that such judgment creditor may levy execution upon them. *Harris v. Alcock*, 158.
11. THERE IS NO IMPLIED WARRANTY IN A SALE OF BALED HEMP, that the interior of the bales corresponds with the exterior. In the absence of fraud, the vendee can not recover damages from the vendor, on account of a difference between the interior and the exterior of the bales. *Salisbury v. Stainer*, 437.
12. SALE BY SAMPLE DOES NOT TAKE PLACE when the purchaser of several bales of hemp cuts open and examines some of them and has ample opportunity to do so with the rest. In such a case there is no implied warranty that the bales not examined correspond with those examined. *Id.*
13. PURCHASERS WITHOUT NOTICE ARE NOT ENTITLED TO PROTECTION, further than as they have actually paid the purchase money. *Hoffman v. Strohecker*, 740.

See CONFLICT OF LAWS, 5; VENDOR AND VENDEE, 4.

SAMPLE.

See SALES, 12.

SCHOOL MEETINGS.

See TAXATION, 1, 2, 8-10.

SEALS.

1. To CONSTITUTE A SEALED INSTRUMENT under the statute, it must express in its body that it is sealed, and the persons executing it must affix scrawls by way of seals. *Grimsley v. Riley*, 319.
2. A FLOURISH IN CONTINUATION of the last letter of a name upon the affixing of a signature, is not such a scrawl as will constitute a seal, where it is not made by way of seal, though the instrument to which the signature is affixed expresses on its face that it is sealed. *Id.*

SEAWORTHINESS.

See INSURANCE—MARINE, 12.

SEPARATE ESTATE

See MARRIED WOMAN, 12.

SET-OFF.

1. COUNTERCLAIM, IN ORDER TO CONSTITUTE A SET-OFF IN EQUITY, must be mutual, or it will not be allowed. *Bunting v. Ricks*, 699.
2. COUNTERDEMAND ARISING FROM A PAYMENT OF MONEY TO A PRINCIPAL, can not be set off against the sureties in an action brought by them, unless the plaintiffs are shown to be legally responsible for the sum paid. *Id.*

SHERIFFS.

See CONTRACTS, 1; JUDGMENTS, 8-11; PROCESS, 7.

SHERIFF'S SALES.

See EXECUTIONS; JUDGMENTS, 24.

SHIPPING.

1. NO POSITIVE RULE OF LAW OR USAGE requires the master of a vessel to always exhibit in the night a light on his vessel while at anchor in a harbor. *Carley v. White*, 259.
2. WHETHER THE OMISSION TO EXHIBIT SUCH LIGHT will amount to such negligence as to bar a claim for an injury received from another vessel running foul of her, depends on the circumstances of the case. *Id.*
3. LIEN FOR REPAIRS DONE OR SUPPLIES FURNISHED TO A VESSEL does not exist if the owner was present at the port when and where the repairs were made or supplies furnished. *Case v. Woolley*, 54.
4. MASTER OF VESSEL HAS NO LIEN FOR HIS SERVICES by the maritime law. *Id.*
5. SEAMEN OR MARINERS, other than the master, are entitled to a lien on the vessel for services rendered on the high seas, or where the tide ebbs and flows. *Id.*
6. LIEN FOR REPAIRS DONE OR SUPPLIES FURNISHED a maritime vessel in a foreign port, is implied by the law of the United States. *Id.*
7. A HOME PORT is any port in which the owner happens to be with his vessel; but, in England, a home port is any port within the jurisdiction of the common law courts of that island, if the owner resides in that country. *Id.*
8. SAILING ON HER VOYAGE is accomplished when an insured vessel quits her

moorings, in readiness for sea and intending to sail, though she is afterwards stopped by head winds. *Bowen v. Merchants' Ins. Co.*, 213.

9. **VESSEL IS AT SEA** when, being at Bangor, Wales, on east side of the straits of Menai, ready and intending to sail, she drops down seven or eight miles below Bangor for the purpose of proceeding on her voyage, but is then detained by head winds and compelled to come to anchor and remain several days. *Id.*
10. **VESSEL IS "ON A PASSAGE"** when detained under the circumstances detailed above, and is within a policy of insurance which purports to continue her insurance if she should be "on a passage" at the expiration of the year for which she was insured. *Id.*
11. **ACKNOWLEDGMENT IN A BILL OF LADING** that merchandise is in good condition, does not extend beyond its external appearance. *Curell v. Johnson*, 117.
12. **CONSIGNEE OF A BILL OF LADING** is by his consignor vested with power to indorse the bill, and thereby transfer the title of the latter in the goods. *Per Verplanck, senator. Saltus v. Everett*, 541.
13. **BILL OF LADING IS TRANSFERABLE, BY THE CUSTOM OF MERCHANTS**, so as to vest the transferee with all the title which the assignor had in the goods embraced in the bill of lading. *Id.*
14. **BILL OF LADING FRAUDULENTLY MADE**, whereby the goods of one person are shipped to or in the name of another, without the consent or knowledge of the former, will not enable the latter to transfer the goods, even to an innocent purchaser for value in the ordinary course of business. *Id.*
15. **MASTER OF SHIP HAS ORDINARILY NO AUTHORITY TO SELL THE CARGO**, and a sale by him, unless in a case of necessity, does not affect the title of the true owner. *Per Verplanck, senator. Id.*

See ADMIRALTY, 3; JURISDICTION, 6-8; NOTICE, 8, 9; TAXATION, 12.

SLANDER.

1. **SLANDER IS A TRANSITORY ACTION**, and may be brought in one state for words spoken in another. *Offutt v. Earlywine*, 40.
2. **DEFENDANT IN SLANDER PLEADING THE TRUTH** of the slanderous words has the burden of proof upon himself to establish their truth. *Id.*
3. **DAMAGES.—PROOF OF THE SPEAKING OF WORDS SLANDEROUS PER SE** entitles the plaintiff to some damages as a matter of right, where the words have been neither explained nor justified. *Yeates v. Reed*, 43.
4. **ATTEMPT OF THE HUSBAND TO PREVENT THE CIRCULATION OF THE SLANDER** spoken by his wife can not be proved, in mitigation of damages, in an action of slander brought against the two. *Id.*
5. **SLANDEROUS WORDS LAID AS SPOKEN AFFIRMATIVELY** are supported by proof that they were spoken in answer to a question. *Id.*

See INSANITY, 1.

SOVEREIGNTY.

See STATUTE OF LIMITATIONS, 8.

SPECIFIC PERFORMANCE.

1. **BILL FOR A SPECIFIC PERFORMANCE** will not be dismissed, as of course, because the title was not perfect at the commencement of the suit, al-

though that may be a sufficient reason for giving costs to the defendant, if he has not made any unreasonable objection to the title. *Ref. Prot. Dutch Church v. Mott*, 613.

2. **SPECIFIC PERFORMANCE MAY BE DECREED**, if it appears by the report of a master that a perfect title can be made to the purchaser at the time of making such report, unless the purchaser has been materially injured by the delay. *Id.*
3. **SPECIFIC PERFORMANCE OF A HUSBAND'S CONTRACT** to transfer the entire interest in lands, as well his own interest as his wife's right of dower, can not be sought in so far as it relates to a transfer of his interest while at the same time an abatement is demanded from the contract price proportionate to the value of dower. In such cases if performance is desired of the husband's contract with reference to his own right, the entire contract price must be tendered. *Clark v. Seirer*, 745.

See EQUITY, 21; STATUTE OF FRAUDS, 2.

STATUTE OF FRAUDS.

1. **STATUTE OF FRAUDS DOES NOT APPLY** to the case of a promise to a debtor, founded upon a full consideration, to discharge a debt due by such debtor to a third person. *Jones v. Hardesty*, 180.
2. **PARTY IS NOT PERMITTED TO SET UP STATUTE OF FRAUDS** as a bar to the specific execution of a parol agreement, where he has received a valuable consideration for the performance of his part of the agreement, although it was not to be fulfilled for more than a year from its date; courts of equity regard such a case as without the purview of the statute. *Id.*
3. **SURRENDER OF LEASE, WHEN NOT WITHIN STATUTE OF FRAUDS.**—Where a landlord enters into a parol agreement to pay a sum of money to his tenant, in consideration of the latter's surrendering his unexpired interest in a lease for years, and of the settlement of certain claims for repairs, and the tenant executes his part of the agreement by delivering possession of the premises to the landlord, according to the terms thereof, such agreement may be enforced by an action against the landlord. *Lamar v. McNamee*, 152.
4. **PROPERTY DELIVERED IN PART EXECUTION OF A CONTRACT** which is void by the statute of frauds, may be recovered back when the other party refuses to perform his part of the contract. *Lucy v. Bundy*, 359.
5. **PART PERFORMANCE OF A PAROL CONTRACT FOR THE SALE OF REAL ESTATE** does not entitle either party to sustain an action at law for damages suffered from non-performance of the residue. *Norton v. Preston*, 128.

See SALES, 1.

STATUTE OF LIMITATIONS.

1. **ACKNOWLEDGMENT TO REMOVE BAR OF THE STATUTE OF LIMITATIONS** must recognize the original existence of the debt, that it yet remains unpaid, and must have been made within the period of limitation. *Elliott v. Leake*, 314.
2. **ACKNOWLEDGMENT THAT A DEBT EXISTS AND IS UNPAID**, made after the original cause of action has been barred by the statute of limitations, is the basis of a new cause of action. *Id.*

3. **WHAT SUFFICIENT ACKNOWLEDGMENT THAT A DEBT IS UNPAID.**—Where a party who has received money on a parol contract for the sale of lands, long after the implied assumpsit arising upon the payment has been barred by the statute of limitations, acknowledges that he received the money, asserts that "he never denied it," that "the money was just," etc., and expresses his willingness to make a deed for the land to which the contract related, the recognition that the debt is unpaid, is sufficient to authorize a jury in finding against the plea of the statute of limitations. *Id.*
4. **STATUTE OF LIMITATIONS CONTINUES TO RUN** in favor of a party, although his tenant in possession acquires, or attempts to take shelter under, the adverse title. *Chambers v. Pleak*, 78.
5. **TENANT OR QUASI TENANT MAY OUST HIS LANDLORD** and hold adversely to him, and after notice of such adverse holding the landlord's title may become barred by prescription. *Id.*
6. **STATUTE OF LIMITATIONS DOES NOT RUN WHERE THERE ARE MUTUAL ACCOUNTS** showing that an item of charge on either side accrued within six years before commencing the action. *Sickles v. Mather*, 521.
7. **THE TERM PERSON "BEYOND SEA, WITHOUT ANY OF THE UNITED STATES"** does not include a citizen of another state, who has never been in this. Such a citizen is therefore not within the exception of the statute of limitations of 1786, c. 52, sec. 4. *Whitney v. Goddard*, 216.
8. **STATUTE OF LIMITATIONS DOES NOT RUN** against the sovereign power, in the absence of express words to that effect. *Cincinnati v. The First Presbyterian Church*, 718.
9. **MUNICIPAL CORPORATIONS** are not exempt from the operation of the statute of limitations, when seeking to recover land dedicated to public use. *Id.*

STATUTES.

OBJECT OF THE STATUTE OF 1831 ABOLISHING IMPRISONMENT for debt was to exempt from imprisonment persons who permanently, for the time being reside here, and whose property and person are within the reach of the process of our courts. *Frost v. Brisbin*, 423.

See CONSTITUTIONAL LAW.

SUNDAY.

See HOLIDAYS.

SURETIES.

See EXECUTORS AND ADMINISTRATORS, 19, 20; JUDGMENTS, 19; NEGOTIABLE INSTRUMENTS, 1, 2; SET-OFF, 2.

SURETYSHIP.

1. **ONE SURETY IS NOT ENTITLED IN EQUITY TO CONTRIBUTION FROM ANOTHER**, if, by ordinary diligence, he can obtain indemnity from their principal. *Morrison v. Poyntz*, 92.
2. **A SURETY, BEFORE PAYMENT**, may maintain a bill in equity against his co-sureties and their principal to compel the latter to pay, if able, or to require the sureties to contribute, when the principal is unable to make payment. *Id.*

3. **ASSUMPT BY ONE SURETY AGAINST ANOTHER** does not lie where recovery can be had from the principal debtor, or out of property which such principal had placed in the hands of plaintiff for his indemnity. *Id.*
4. **APPLICATION TO A CO-SURETY FOR PAYMENT OR CONTRIBUTION** is not indispensable to a recovery against him for his share of the moneys actually paid by his fellow-surety to discharge the debt of their principal. *Id.*
5. **SURETIES ARE SUPPOSED TO ASSUME THE SAME RISK**, and to stand, in relation to their principal, in the same situation, obtaining no benefit from the transaction, but each equally subjecting himself to responsibility. *McPherson v. Talbott*, 191.
6. **CONTRIBUTION FROM CO-SURETY, WHEN SURETY NOT ENTITLED TO.**—Where a surety, without his co-surety's knowledge, by a previous arrangement with the principal, receives one half of the sum borrowed, he is not entitled to contribution from such co-surety. *Id.*
7. **RELEASE OF SURETY ON NOTE.**—Where a joint and several note, made by T. as principal and the defendant as surety, payable to a bank, on demand, as collateral security for a check given by the principal for a loan of money, remained in the bank six months before it was entered on the bank's books, the loan being intended to be temporary, and the surety was not called on for payment, nor was notice given to him of the non-payment of the note until the further lapse of six months, when the principal had become insolvent, these circumstances were held not to release the surety in an action upon the note. *President etc. Commercial Bank v. French*, 280.
8. **JUDGMENT COLLECTIVELY SUFFERED BY AN ADMINISTRATOR, DOES NOT BIND HIS SURETIES**; nor are they bound if it was obtained in an action commenced more than four years after he gave notice of his appointment as required by statute. *Heard v. Lodge*, 197.
9. **SURETIES OF ADMINISTRATOR ARE, BY A JUDGMENT AGAINST HIM, ESTOPPED**, for most purposes, from denying the validity of a debt established by it against him. *Id.*
10. **SURETY OF EXECUTORS OF A NON-RESIDENT ON A PROBATE OF HIS WILL GRANTED IN THIS STATE**, is not liable for assets received from another state; for, over such assets, the court here had no jurisdiction. (Judge Ewing dissenting.) *Fletcher v. Sanders*, 96.
11. **SURETY ON AN APPEAL BOND IS EXONERATED FROM LIABILITY** if, after the judgment is affirmed, and execution issued thereupon, the latter is released at the instance of the creditor, and the goods seized thereunder restored to the principal debtor. *Cooper v. Wilcox*, 695.
12. **ACTIVE DILIGENCE IS NOT REQUIRED** in order to bind the surety, and mere forbearance or delay would furnish no ground upon which the surety could ask to be exonerated. *Id.*
13. **MONEY PAID BY A SURETY UPON A JUDGMENT AT LAW AGAINST HIM**, may be recovered in equity, when, by reason of the neglect of the creditor in releasing an execution against the principal debtor, the liability of the surety is, in effect, extinguished. *Id.*
14. **SURETIES ON AN OFFICIAL BOND ARE ENTITLED TO ALL THE SECURITIES AND REMEDIES** which could be taken advantage of at the instance of the creditors of the officer. *Bunting v. Ricks*, 699.
15. **SURETIES ON AN OFFICIAL BOND MAY RECOVER** from one who assisted in the commission of a breach of a trust imposed upon their principal in his

official character, without any actual payment having been made to the *cestui que trust*, in satisfaction of his loss. *Id.*

TAXATION.

1. **WHETHER A WARRANT UNDER WHICH A MEETING** was called that elected a committee to levy a school tax is regular or not, can not be inquired into in an action to recover back money paid for the tax. *Williams v. School District*, 243.
2. **THAT SUCH COMMITTEE WAS A COMMITTEE DE FACTO** is sufficient to sustain the tax. *Id.*
3. **WARRANT FOR THE ANNUAL TOWN MEETING** held by law, for the purpose of choosing officers, contained articles "to choose all necessary town officers," and "to choose all necessary committees," and the statute allowed either of two modes of choosing committees. It was held under these articles the town was authorized to determine which mode should be pursued, and to pass a vote, "that each school district choose their own committees," this being one of the modes provided by statute. *Id.*
4. **PROVISION OF THE REVISED STAT., c. 23, sec. 37**, that an assessment of a school district tax shall be made within thirty days after the clerk of the district shall certify to the assessors the sum voted by the district to be raised, is directory, and does not prohibit an assessment after the expiration of that period. *Id.*
5. **OMISSION, THROUGH ERROR OF JUDGMENT or mistake of law**, of an assessor to assess on an individual a school district tax, does not invalidate the assessment as to other persons. *Id.*
6. **WHERE ONE OF THREE ASSESSORS FAILS TO ATTEND** and act in assessing a tax, after proper notice, the other two may proceed without him. *Id.*
7. **EVIDENCE on the part of the plaintiff in an action against a school district** to recover the amount of a tax paid for building a school-house, that there was already a sufficient school-house in the district, is inadmissible. *Id.*
8. **WHETHER A COLLECTOR OF TAXES** has been duly elected and sworn is a question that is not open to a plaintiff in an action against a school district to recover a tax which he has paid such collector. *Id.*
9. **WHERE TWO RECORDS OF A SCHOOL DISTRICT WERE KEPT**, from only one of which it appeared that a committee had been duly elected at a meeting of the district, and the clerk who made the records testified that both were made by him soon after the meeting from loose memoranda kept at the meeting, it was held that the records were not contradictory, and both being originals, that the election of the committee was duly proved. *Id.*
10. **CLERK OF A SCHOOL DISTRICT** elected under the Rev. Stat., c. 23, sec. 27, is competent to act as such, although he has removed into an adjoining district in the same town, and another has been chosen in his stead, but not sworn. *Id.*
11. **RETURN OF A CONSTABLE** upon a warrant issued to warn a town meeting, that he had warned the inhabitants to meet at the time named therein, dating his return less than fourteen days before the meeting, is not conclusive to show that the required notice of fourteen days before the meeting has not been given. *Id.*

12. **STRENGTHS MAY BE TAXED WHERE THE OWNERS RESIDE**, though they are navigated beyond the boundary of the state; and a statute requiring them to be so taxed does not conflict with the constitution of the United States nor the ordinance of 1787. *Perry v. Torrence*, 725.

TENANTS IN COMMON.

See CO-TENANCY.

TENDER.

1. **TENDER, EFFECT OF PREVENTING.**—Where a bond and mortgage, which provided for the payment of the principal sum in five years, and the interest annually, and if the interest was not so paid the whole principal should become due, was assigned by the mortgagee, and notice given to the mortgagor of the assignment, but no information given of the assignee's residence, and when the interest became due, the mortgagor being unable to find the assignee, tendered the interest due to the mortgagee, who refused to accept it, and shortly afterwards the assignee filed a bill to foreclose, the tender was held sufficient to save the forfeiture, or at least to authorize the court to stay the proceedings to foreclose upon the payment of the interest then due, until further default in payment of the principal or interest, it appearing that the assignment was to deprive the mortgagor of the power of paying the interest when it became due. *Noyes v. Clark*, 620.
2. **SUIT COMMENCED** by a creditor, who keeps out of the way to prevent a tender of the amount due him, will be stayed upon payment of the amount due, without costs, although a technical right of action existed at the commencement of the suit. *Id.*

See COVENANTS, 7.

TIME.

See DEEDS; EVIDENCE, 13; HOLIDAYS, 1.

TITLE.

See COVENANTS, 1, 3, 8; EQUITY, 2.

TORTS.

See ACTIONS, 4; CO-TENANCY, 3.

TOWN MEETINGS.

See TAXATION, 3, 11.

TRESPASS.

1. **PLEA OF JUSTIFICATION TO AN ACTION OF TRESPASS** for killing plaintiff's dog, is sustained by proof indicating that the defendant acted under a reasonable apprehension that the killing was necessary to prevent the destruction of his own property. *Parrott v. Hartfield*, 673.
2. **EVIDENCE IN SUPPORT OF PLEA OF JUSTIFICATION** to such action, need not show that plaintiff was cognizant of the mischievous disposition of the dog, or that the defendant had no other mode of protecting the property menaced. *Id.*

3. PROPRIETARY VALUE OF A DOG NEED NOT BE PROVED TO SUSTAIN TRESPASS against another for killing him. *Dodson v. Mock*, 677.
 4. JUSTIFICATION AS A DEFENSE TO AN ACTION FOR KILLING A DOG is not established by evidence showing such animal to have been merely troublesome at times, unless his disposition was such as to render him a nuisance to the community. *Id.*
 5. TRESPASS CAN NOT BE SUSTAINED TO RECOVER DAMAGES FOR CONSEQUENTIAL INJURIES; it is necessary to the maintenance of this action that the injury should immediately have followed the act complained of. *Id.*
- See EASEMENTS AND SERVITUDES, 10; EJECTMENT; LANDLORD AND TENANT, 3-7.

TROVER.

TROVER FOR GOODS MAY BE SUSTAINED though a lien thereon exists in favor of defendant, if before the commencement of the action, he had converted them by an absolute sale thereof. In such case no tender of the amount of the lien need be made, but the defendant may recoup the damages to the extent of such amount. *Salts v. Everett*, 541.

TRUSTS AND TRUSTEES.

1. WHERE THE OBJECT FOR WHICH A CONVERSION of real estate into personality fails, either wholly or in part, so that the proceeds thereof are not legally and effectually disposed of by the testator, there is a resulting trust in favor of the heirs at law *pro tanto*. *Hawley v. James*, 623.
 2. A TESTATOR DIED SEIZED OF LANDS IN ANOTHER STATE which, by his will, he devised to his executors and trustees, to be sold, and directed the proceeds to be invested in lands in the state where he was domiciled at the time of his death, upon trusts which were illegal and void by the laws of that state: held, that there was a resulting trust in favor of the heirs at law as to the land devised, and that the executors and trustees would be decreed to transfer the legal title to such heirs. *Id.*
 3. CO-OPERATION OF A STRANGER WITH A TRUSTEE in an act amounting to a breach of the trust, will render him liable for the loss occasioned thereby, if he had such notice of the existence of the trust as was sufficient, ordinarily, to awaken distrust, or put him upon inquiry. *Bunting v. Richs*, 699.
 4. ACTUAL KNOWLEDGE OF THE EXISTENCE OF A TRUST IS NOT REQUIRED to render a person liable who acts together with a dishonest trustee, in a matter constituting a misapplication of the trust fund. *Id.*
 5. BREACH OF TRUST OCCASIONED BY MISAPPLICATION, by the clerk of a court, of the proceeds of a negotiable promissory note, held by him in trust, is sufficient to charge one who took the note in ignorance of the character in which it was retained by the officer, but was cognizant that it had been given to a commissioner, in payment, at a sale under his direction, in obedience to a decree of court. *Id.*
- See CHARITABLE USES, 2-4; CONFLICT OF LAWS, 3; CONSTITUTIONAL LAW, 9, 14; CORPORATIONS, 4-7, 11; EQUITY, 2; EXECUTORS AND ADMINISTRATORS, 2, 7.

USAGE.

USAGE THAT PERSON EMPLOYED TO EXCAVATE SAND FROM LOTS to conform them to a general plan shall, in addition to the compensation stipulated, AM. DEC. VOL. XXXII—54

be entitled to the sand excavated, is valid and binding if it has long existed and been well known, and the parties have not made any express agreement inconsistent with it. *Cooper v. Kane*, 512.

See COMMON CARRIERS, 12; NEGOTIABLE INSTRUMENTS, 8; SHIPPING, 1, 12.

USE AND OCCUPATION.

See ASSUMPT, 1.

USURY.

See CONTRACTS, 4.

VARIANCE.

See PLEADING AND PRACTICE, 2.

VENDOR AND VENDER.

1. ACTION FOR PURCHASE PRICE of a town lot can not be successfully resisted upon the ground of the failure of the vendor to comply with his promise made, as owner of the town in which the lot was situated, at the time of the public sale at which it was bid off, to erect a storehouse in the town, and to build a bridge across a river that passed through the town. *Miller v. Howell*, 36.
2. PURCHASER FROM THE UNITED STATES OF PUBLIC LANDS acquires title to the crops growing on the land at the time of the purchase, and which were planted prior thereto by other persons. *Boyer v. Williams*, 324.
3. CONVEYANCE OF A PARTICULAR TRACT without specification of quantity does not bind the vendor to a warranty of any particular number of acres, though there may have been an expectation in both parties to the sale founded on documents and other evidence known to both, that the tract contained a larger quantity than it actually does. *Moore v. Vick*, 391.
4. CONDITIONAL DELIVERY OF PROPERTY TO VENDER, in case of a sale upon a condition, does not vest the property in him until he performs the condition. *Lucy v. Bundy*, 359.
5. WHERE INCUMBRANCES ARE CREATED ON LAND SUBSEQUENT TO AGREEMENT for the sale thereof, the agreement can not be enforced while the incumbrances burden the land. *Withers v. Baird*, 754.

See SALES.

VERDICT.

See CRIMINAL LAW, 6, 7.

WAIVER.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 2, 3; ATTACHMENTS, 4; EXECUTIONS, 10; JURY, 3; WITNESSES, 8.

WARRANTY.

See COVENANTS, 9; DOWER, 6; INSURANCE—MARINE, 9; SALES, 11, 12.

WASTE.

See LANDLORD, 3.

WATERCOURSES.

1. **WHETHER A RIVER IS NAVIGABLE** is a question of fact that in no manner depends upon whether or not the legislature has declared the river navigable. *Martin v. Bliss*, 52.
2. **LOSS CAUSED BY A PERMANENT IMPEDIMENT LAID ACROSS A NAVIGABLE RIVER** is chargeable to the person who has placed it there, though the loss happened in an attempt to pass property which was being taken down the river, across the impediment, which it was known to the person attempting must result in loss. *Id.*
3. **PRESCRIPTIVE RIGHT TO NAVIGATE A CREEK** exists, if it is in fact navigable and has been so used for twenty years. *Brubaker v. Paul*, 111.
4. **THE RIGHT TO NAVIGATE A CREEK** justifies the removal of obstructions therefrom and the use of the force requisite, although a battery or wounding be found necessary. *Id.*
5. **WHARF EXTENDED BELOW LOW WATER** gives no right of possession to any adjacent land under water not actually covered by the wharf, nor any right to the exclusive use of the open space at its side. The only right of the wharfowner over the adjacent water is that which he has in common with all others, of mooring vessels upon it or passing and repassing with boats and vessels engaged in navigation. *Gray v. Bartlett*, 208.
6. **OWNER OF FLATS, COVERING THE WHOLE THEREOF WITH A WHARF**, does not thereby make such a claim of right to use the land of a coterminous proprietor to lay vessels upon, as will ripen into a prescriptive right to so use such land, although the adjacent proprietor acquiesces in the maintenance of the wharf. *Id.*
7. **WHERE LANDS ARE UNDER LOW-WATER MARK**, title is not to be acquired by prior occupancy, while they are part of the public domain. *Id.*
8. **PERSON HAVING RIGHT TO USE CERTAIN QUANTITY OF WATER** in a stream for mill purposes, may change the mode and place of using it, provided the quantity used is not increased, and the change does not prejudice the rights of others; hence a millowner may raise his gates at a dam where he has acquired a right to use a certain quantity of water, and allow it to pass through, in order that he may use it at points further down the stream. *Whittier v. Cocheco Mfg. Co.*, 382.
9. **SUCH OWNER MAY DRAW A LARGER QUANTITY** through such gates than he was accustomed to use, if the surplus was provided by him by means of a reservoir higher up the stream. *Id.*
10. **MAINTENANCE OF DAM AND UNINTERRUPTED USE** of the water in a stream for twenty years furnish conclusive evidence of a right to continue the dam and the use of the water, to the same extent that it was used during that period; but the existence of a portion of a dam for that length of time furnishes no evidence of a right to use all the water at that point. *Odiorne v. Lyford*, 387.
11. **PARTY CAN NOT JUSTIFY COVERING UP DAM** erected by another, on the ground that it is a nuisance obstructing the use of a public highway. *Id.*

See BOUNDARIES, 5; EASEMENTS AND SERVITUDES, 1-8.

WHARVES.

See WATERCOURSES, 5, &.

WILLS.

1. WHERE AN INTEREST IN PROPERTY IS GIVEN BY WILL to one person, with a limitation over of the same interest either to his children or other person upon the death of the first devisee or legatee before the time appointed for such interest to vest in possession, the death of the first devisee or legatee, although in the life-time of the testator, does not produce a lapse of the limitation over of that interest to the substituted objects of the testator's bounty. *Mowatt v. Carow*, 641.
2. WORDS IN A TESTAMENTARY DISPOSITION will be presumed to have been used in their ordinary or primary sense, unless it appears from the context of the will that they were used in some other sense; or, unless, by reference to extrinsic circumstances, the use of the words in their primary sense would render the provision of the will insensible or inoperative. *Id.*
3. "CHILDREN" IN COMMON PARLANCE DOES NOT INCLUDE "GRANDCHILDREN," or any others than the immediate descendants in the first degree of the person named as the ancestor; but it may include them where there are no persons in existence who would answer to the description of children in the ordinary sense of the word at the time of making a will; or where there could not be any such at the time or in the event contemplated by the testator; or where the testator has clearly shown, by the use of other words, that he used the word children as synonymous with descendants, or issue, or to designate or include illegitimate offspring, grandchildren, or stepchildren. *Id.*
4. WHERE, IN A LIMITATION TO THE SURVIVORS OF A CLASS of devisees or legatees, any of the class are *in esse* at the death of the testator so as to be capable of taking a vested interest, the survivorship is usually construed with reference to that time, so as to give the representatives of such of the class as die after the testator, the right to a share of the devise or bequest to the class. *Id.*
5. WHERE A LEGACY OR DEVISE OF A RESIDUARY BEQUEST IS GIVEN TO TWO or more persons by name as tenants in common, or in severalty, or to be divided among them share and share alike, without any words indicating an intention of the testator to give the same over to the survivors, the shares of such persons respectively will become lapsed by the death of the legatee or devisee in the life-time of the testator; or, under the revised statutes, will go to their children or descendants if they are descendants of the testator. *Id.*
6. CONDITION ANNEXED TO A DEVISE OF LAND, that it shall not be "subject to conveyance or attachment," is void. *Blackstone Bank v. Davis*, 241.
7. DEVISE OF HIS PLANTATION may include two separate tracts of the testator, half a mile distant from each other, but which were usually cultivated together as one farm. *Bradshaw v. Ellis*, 636.
8. DEVISE WHICH CONTAINS A SPECIFIC DIRECTION that all of testator's property shall remain upon his plantation, consisting of two separate tracts of land, in charge of his wife, until his youngest son shall attain full age, and then proceeds to bequeath one tract to that son and another, and one third of the remaining tract to his wife, for her life, vests in the wife, by

implication, a chattel interest in the whole of both tracts, during the son's minority. *Id.*

See TRUSTS AND TRUSTEES, 1, 2.

WITNESSES.

1. WHERE AN APPEAL IS TAKEN from a decree of a probate judge, on the ground that he is interested in the estate and has therefore no jurisdiction to enter such decree, he is a competent witness to prove that he is not interested. *Sigourney v. Sibley*, 248.
2. PARTY MAY BE WITNESS FOR HIMSELF, IF HIS ADVERSARY CONSENT; and his deposition read without objection may operate for himself as well as his co-defendant, especially if he be insolvent and have no real interest. *Fletcher v. Sanders*, 96.
3. OBJECTION THAT WITNESS WAS EXAMINED without notice being given to the opposite party, or that a party to the suit was examined as a witness, can not, since the passage of the act of 1832, c. 302, sec. 5, be allowed in the court of appeals, unless it appears from the record that it was raised by way of exception in the court below. *Jones v. Hardisty*, 180.
4. HUSBAND IS INCOMPETENT TO BE A WITNESS AGAINST HIS WIFE in a criminal prosecution for adultery, as to matters transpiring during the existence of the marriage relation between them, although, before the trial in which he is called to testify, the parties had been divorced. *State v. Jolly*, 656.
5. INCOMPETENCY OF HUSBAND TO TESTIFY AGAINST THE WIFE, is not restricted to testimony the sole object of which is to convict her of crime, but the prohibition extends to and includes whatever may have a direct tendency to criminate and degrade. *Id.*
6. HUSBAND OF A WOMAN IS NOT COMPETENT as a witness against a person jointly indicted with her for adultery, as to acts committed during the subsistence of the marriage relation. *Id.*
7. PARTY IS NOT BOUND BY THE TESTIMONY OF HIS OWN WITNESS so as to preclude him from proving that the facts were otherwise than as stated by the witness; but he can not, to attain this result, prove declarations of the witness differing from his testimony on the trial. *Stockton v. Demuth*, 735.
8. THE OBJECTION OF INCOMPETENCY AS A WITNESS IS WAIVED, where the party who might have made the objection calls the witness in support of his own case. *Id.*

See BONDS, 2.











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